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No. 93-452

In the

Supreme Court of the United States

October Term, 1993

SIOUX MANUFACTURING CORPORATION,
Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE UNITED STATES OF AMERICA EX REL. GLENN A. HALL, MICHAEL A. MAPES, AND FRED TRIBBLE IN SUPPORT OF PETITIONER

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November 10, 1993

1993 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

BEST AVAILABLE COPY

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble respectfully move this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the Petitioner herein has been obtained, but the attorney for the Respondent herein refused to consent to the filing of a brief by United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble as *amicus curiae*.

The Applicants, United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble, have an interest in this case in that they have now pending in the Court of Appeals for the Eighth Circuit an appeal of a decision of the United States District Court for the District of Minnesota in fifty-seven consolidated cases, styled as United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble against various defendants, No. 93-2903 MNST (the "Eighth Circuit Cases"). One of the questions involved in the Eighth Circuit Cases is the same as that presented for decision in the instant case, that is, the correct application and scope of 25 U.S.C. § 81, specifically as it relates to the "relative to [Indian] lands" portion of that statute. The Applicants also now have pending in the Court of Appeals for the Seventh Circuit an appeal of a decision of the United States District Court for the Western District of Wisconsin in seven consolidated cases styled as United States of America ex rel. Glenn A. Hall, Michael A. Mapes, and Fred Tribble against Indian Country Leasing Company and Interstate Gaming Services, Incorporated, Nos. 93-3361 through 93-3367. These cases also involve 25 U.S.C. § 81.

Questions involving the application and scope of 25 U.S.C. § 81 are critically important to the proper management of Indian gaming, which is taking place on Indian reservations in the United States on a widespread basis, and, consequently, critically important to the welfare of the individual members of the Indian tribes on these reservations. Without a correct

application of Section 81 to the arrangements being entered into between outside suppliers of goods and services to the various Indian tribes for use in gaming activities on these reservations, unconscionable contracts will continue to be made with these tribes, and money which should properly belong to the individual members of the tribes and used for the benefit of all tribal members, will instead continue to be diverted to third parties, sometimes for use in creating gaming operations directly in competition with those of Indians on the reservations. At this juncture in the history of the development of Indian gaming on Indian reservations, it is critically imperative that this Court take swift and affirmative action to enforce the congressional mandate set forth in 25 U.S.C. § 81 to protect Indians from these unconscionable contracts. The enforcement of this mandate is at least as important today as it was when this statute and related statutes were originally enacted by Congress, and the Federal policies which gave rise to the legislation have been continuously reaffirmed by Congress as it has revisited Title 25 through the intervening years.

The Petition for Writ of Certiorari of the Petitioner herein argues that the Letter of Intent in the instant case was one which was "relative to" Indian land and hence was governed by the provisions of 25 U.S.C. § 81. However, the discussion therein of this point is inadequate since the contract or Letter of Intent was not one involving arrangements to provide gambling devices to an Indian tribe on a reservation. Applicants have no reason to believe that the argument on this point will be expanded and made complete in this Court relative to the critically important issue of the application of Section 81 to these other types of transactions, which are also "relative to" Indian land and which this Court should be cognizant of in making any decisions on the scope of Section 81 in the instant case. Accordingly, and because there are a variety of other related issues which will be coming before this

Court in the future (including a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, pursuant to Rule 11 of the Supreme Court Rules, which Applicants herein plan to file in the near future), this Court should grant the Applicants' request for leave to file the accompanying brief in this case as *amicus curiae* relative to the appropriate scope and application of 25 U.S.C. § 81.

Dated: November 10, 1993.

COUREY, ALBERS, GILBERT
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INTEREST OF THE UNITED STATES OF AMERICA EX REL. GLENN A. HALL, MICHAEL A. MAPES, AND FRED TRIBBLE

Glenn A. Hall, Michael A. Mapes, and Fred Tribble are individuals who have brought suit in the United States District Courts for the Districts of Minnesota and Western Wisconsin in the name of the United States of America against various individuals and entities under the citizen's suit provisions of United States Code Title 25, Sections 201 and 81, by reason of the defendants' violations of Sections 81 (the "Indian Contract Law"), 261-264 (the "Indian Trader's Act"), and 2701 et. seq. (the "Indian Gaming Regulatory Act" or "IGRA"). All of said defendants have entered into arrangements with Indian Tribes pursuant to which defendants agreed to lease or sell gambling devices for use on various Indian reservations in Minnesota and Wisconsin and to provide varying other services in connection therewith and were paid money therefor by the tribes without having fulfilled the requirements of 25 U.S.C. § 81 or § 264.

Fifty-seven of these cases, venued in the District of Minnesota, are now on appeal as a consolidated appeal to the Eighth Circuit Court of Appeals, No. 93-2903 MNST. One of the issues present in that consolidated appeal is also present in the instant case, namely the proper scope and application of 25 U.S.C. § 81. Seven of these cases, venued in the Western District of Wisconsin, are now on appeal as a consolidated appeal to the Seventh Circuit Court of Appeals, Nos. 93-3361 through 93-3367. Those cases also involve 25 U.S.C. § 81.

Accordingly, Glenn A. Hall, Michael A. Mapes, and Fred Tribble, in the name of the United States of America, have a vital interest in seeking review of the Seventh Circuit's decision in the instant case. That decision, if left undisturbed,

could improperly restrict the application of Section 81 to "land transactions" rather than to transactions "relative" to Indian lands, in direct contradiction to the express language of Section 81, Congressional intent, and the prior interpretations of Section 81 by this Court.

The real and primary battleground for the scope and application of Section 81 today is in the area of Indian gaming. Hall, Mapes, and Tribble, as relator plaintiffs with multiple cases currently on appeal to two different circuits relative to the application of Section 81 to Indian gaming cases, are therefore in a unique position to make a significant contribution to this Court's consideration of Section 81. Neither party in the instant case has an interest in informing the Court of the significant and far reaching impact any decision of this Court relative to Section 81 will have on Indian gaming in the United States and the ability of individual Indians to receive the benefits they should be receiving from such activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the very founding of the United States of America Congress has recognized the special fiduciary relationship between the United States Government and Indians. This fiduciary relationship was initially established by the Trade and Intercourse Act of 1790. In 1871, this fiduciary relationship was further expressed and implemented through the enactment of the predecessor to today's Section 81. Section 81 curtails the contractual powers of Indian tribes by requiring that any contract or agreement made by any person with any tribe in consideration for services for Indians relative to their lands must be in writing and approved by the United States Government. If the dictates of Section 81 are not followed,

then all money paid to any such person by any Indian or tribe can be recovered. The writing and approval requirements of Section 81 were enacted to protect Indian tribes from unconscionable or improvident agreements, thus fulfilling the United States Government's general trust duty to act in the best interests of Indians.

Such protection is all the more critical to implement today, as Indian gaming proliferates on Indian lands throughout the United States. Due to the very nature of the gaming industry, and particularly the large amounts of profits available, there is great potential for greed and overreaching on the part of those dealing with Indians. There is also great potential for the use of Indian gaming revenues to better the lives of those on the reservations. As a result, gaming arrangements between Indian tribes and others are obviously ones in which Indians are particularly vulnerable. Such being the case, they are also the types of arrangements to which Section 81 should and must be applied vigorously by the courts.

The legislative history of Section 81, the prior pronouncements of this Court and other courts relative to Section 81, the interpretation of Section 81 by the administrative agencies designated to implement it, and rules of statutory construction specially applicable to Indian lands all clearly indicate that Section 81 must be interpreted and applied broadly to meet the Congressional policy of protecting Indian tribes from unconscionable and improvident agreements. Its scope and application cannot be limited by attempting to limit the meaning of the "services" or the "relative to [Indian] lands" language of the statute.

The Seventh Circuit's interpretation of Section 81 as designed merely to protect Indian tribes in "land transactions" improperly and unnecessarily eviscerates Section 81 at a time

when it is vitally needed to protect Indians from unconscionable and improvident contracts relating to gaming activities.

ARGUMENT

A. Congress Originally Intended a Broad Application of 25 U.S.C. § 81.

From the very inception of our nation's history, the U.S. Congress has recognized the special fiduciary relationship existing between the United States Government and Indians. This relationship was first recognized in the Trade and Intercourse Act of 1790, 1 Stat. 137, now covered by Title 25, United States Code. See, e.g., *United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973). Subsequently, in 1871, Congressional policy recognizing this fiduciary relationship saw further expression in the enactment of the predecessor to 25 U.S.C. § 81, the Act of March 3, 1871, 16 Stat. 570. This statute was amended by the Act of May 21, 1872, 17 Stat. 136, and later by Revised Statutes sections 2103 to 2106.

Section 81 has the effect of curtailing the contractual powers of Indian tribes, since approval and execution by both the Secretary of the Interior and the Commissioner of Indian Affairs (now the Assistant Secretary-Indian Affairs since 1977 [See 42 Fed. Reg. 53, 682 (1977)]) is required.

This case involves the determination of the appropriate scope and application of United States Code Title 25, Section 81, which provides, in part:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment . . . of any money . . . or for the granting or

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

Pgs. 5 & 6

> Mr. Cole. I think it does.
>
> Mr. Harlan. It would prevent such contracts being made by them unless approved by the Secretary of the Interior in any matter relating to the land. . . .

Id. at 1486.

There can be no question but that Congress in passing the predecessor to 25 U.S.C. Section 81 intended to protect Indians and Indian tribes in their commercial dealings with non-Indians. The debate leading up to the passage of the legislation shows that the legislators were also aware of the very broad scope of the legislation that was being enacted and that the intent of Congress in passing the predecessor of Section 81 was to have it apply to <u>all</u> contracts and agreements which related to Indian land, not merely "land transactions".

This Congressional intent has not wavered over the years. For example, in 1958 Congress amended 25 U.S.C. § 81 to eliminate the requirement that all contracts with Indian tribes relating to their lands be executed by a judge of record. It is clear from the House Report on the proposed amendment and the report from the Department of the Interior set forth therein that Congress was aware that Section 81 was being applied not only to contracts between Indian tribes and attorneys, but to contracts between Indians and businessmen as well. *H.R. Rep. No. 2449, 85th Cong. 3d. Sess. 1 (1958) [U.S. Cong. & Code 3961].* It is equally clear that the Department of the Interior interpreted Section 81 as requiring ". . . *all* contracts with Indian tribes relating to their lands. . . to be approved by

the Secretary of the Interior and the Commissioner of Indian Affairs." *Id.* at 3961 (emphasis added). Congress had in 1958 the perfect opportunity to amend Section 81 to limit the broad manner in which it was being applied by the Department of Interior. The only change that Congress made in Section 81, however, was to eliminate the need for court approval.

Again, in 1988, when Congress passed the Indian Gaming Regulatory Act ("IGRA"), it had another opportunity to amend Section 81, but declined to do so. Recently, in connection with the publishing of its final rules, the National Indian Gaming Commission, created by IGRA, commented: "section 81 remains in full force and effect, including the citizen suit provision. The IGRA contains no express repeal of section 81." 58 Fed. Reg. 5802, 5818 (1993).

Thus, Congress' intent that Section 81 be interpreted broadly has remained consistent from the enactment of Section 81's predecessor statute to the present day. It is the duty of the courts to carry out this intent.

B. Public Policy Mandates That the Original Congressional Intent of Broad Application of Section 81 Continue.

The protections afforded Indians and Indian tribes by Section 81 are perhaps needed even more today than when Section 81's predecessor statutes were first enacted. The nature and extent of the present day exploitation of Indians and Indian tribes in their contractual dealings was recently illustrated by the results of a United States Department of Interior survey of the implementation of the Indian Gaming Regulatory Act. This survey was ordered "because allegations concerning contracts for gaming services indicated that

excessive revenues were being realized by operating companies at the expense of the tribes and that other improprieties in certain gaming operations on Indian land also existed."[1] The results of the audit performed by the Inspector General support the allegations which prompted the survey and are contained in his Survey Report: *Implementation of the Indian Gaming Regulatory Act*, Report No. 93-I-349, December, 1992 (the "Report").[2]

In the Report itself, the Inspector General stated:

> . . . some gaming establishments are operating in direct violation of the Act, and Indian tribes may be losing significant income because of fraud or abuse in an industry that is generating revenues of approximately $2 billion a year on Indian lands.

Report at p. 1-2. In reporting the results of his survey, the Inspector General states:

> Approximately 260 gambling operations . . . have been established on Indian lands with minimal or no effective oversight from Federal or state governments. As a result, substantial amounts of gaming revenues that should have been realized by the tribes are instead being siphoned off by

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[1]Memorandum from the Inspector General, United States Department of Interior to Secretary, United States Department of Interior (Dec. 31, 1992).

[2]Memorandum Survey Report from the Assistant Inspector General for Audits, Office of Inspector General, United States Department of Interior to the Assistant Secretary for Indian Affairs and the Chairman, National Indian Gaming Commission, concerning the final survey report on implementation of the Indian Gaming Regulatory Act, Report No. 93-I-349.

> enterprises hired to manage and equip the gaming operations.

* * *

Continuing, the Inspector General reported:

> With little or no Federal guidance and oversight, many of the tribes were in a disadvantageous position when negotiating with companies that were hired by the tribes to manage gaming operations. This resulted in these companies' often taking advantage of the tribes by entering into inequitable agreements and contracts.

Report at p. 10.

Gaming, being a *malum in se* activity, has always been highly regulated and has not been permitted absent explicit statutory authority such as the IGRA. Due to the very nature of the gaming industry, and particularly the large amounts of profits available, there is great potential for greed and overreaching on the part of those dealing with Indians. There is also great potential for the use of Indian gaming revenues to better the lives of those on the reservations. As a result, gaming arrangements between Indian tribes and others are obviously ones in which Indians are particularly vulnerable. Protection of Indians from inequitable agreements and contract was, of course, the driving purpose behind the enactment of the predecessor to today's Section 81. From the above Report of the Inspector General, it is obvious that the vulnerability of Indians and Indian tribes in the area of gaming is being exploited on a significant scale and the large profits being generated are not benefitting Indians and tribes as much as they should. As a result, present day public policy

mandates that the broad scope of Section 81 originally intended by Congress be upheld by today's courts in order to protect Indians and Indian tribes in contracts relating to Indian gaming, thus fulfilling the United States Government's fiduciary obligations to Indians.

C. Case Law Interpreting Section 81 Has Upheld the Broad Application of the Statute as Originally Intended by Congress.

At the time Section 81 was originally enacted, Congress was confronted with specific abuses being visited upon the Indians by unscrupulous attorneys and Indian agents. A review of the subsequent case law interpreting Section 81 and its predecessors reveals that, in accordance with original Congressional intent of broad scope and application, the law has been applied not only to contracts Indians have entered into with attorneys and Indian agents, but to contracts with persons other than attorneys and Indian agents as well. It has also been applied to contracts for goods as well as to contracts involving services.

In re Sanborn, 148 U.S. 222 (1893), which dealt with a contract between an Indian tribe and an attorney, recognized the general trust duty imposed upon the Secretary of Interior and stated that the purpose of Section 81 is to protect Indian tribes from "unconscionable and improvident agreements." *Id.* at 227.

One of the first cases to apply Section 81 in a context not involving an attorney or an Indian agent was *Green v. Menominee Tribe*, 233 U.S. 558 (1914). Green was a licensed trader who had an oral contract to provide supplies and equipment to be used by the Menominee Tribe to harvest timber growing on tribal land. When Green did not receive

payment for the supplies and equipment he had provided, he sued the Tribe to recover the money he claimed was owed to him. This Court cited to the provisions of Section 2103 (predecessor of 25 U.S.C. § 81), which required all agreements with Indian tribes to be in writing, to be executed before a judge, and to bear the approval of the Secretary of Interior and the Commissioner of Indian Affairs. This Court then noted that agreements made in violation of Section 2103 are null and void, and affirmed the judgment of the Court of Claims which had dismissed Green's claims. This Court in *Green* clearly approved of the application of Section 81's predecessor to contracts for the sale of "supplies and equipment", thus affirming that the term "services" in Section 81 includes the service of provision of goods. Thus, violators of Section 81 cannot hide behind a narrow and restrictive meaning of the term in a manner contrary to Congressional intent.

A more recent decision which confirms the applicability of Section 81 to any contracts relating to Indian land is *Montana Bank of Circle, N.A. vs. United States*, 7 Cl. Ct. 601 (1985). The Bank of Circle had loaned money to the Fort Belnap Indian Community. When the Indians did not repay the loan, the Bank of Circle sued the United States, alleging a breach by the United States of the fiduciary duty established by 25 U.S.C. § 81. While the Claims Court recognized the general trust relationship that exists between the United States and the Indians, and that Section 81 is to be construed in light of that relationship, it refused to find that Section 81 would support a right of recovery against the government for a breach of that relationship. The court did conclude, however, that: "Section 81 requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for *any contract* made by any person with any tribe of Indians, or with individual

Indians." *Id.* at 612. (emphasis added).

In a number of recent cases, Section 81 has been applied to transactions between casino managers and Indian Tribes. In *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613 (1985), the court, after citing to the precedent established by *In re Sanborn* and *Green*, applied the provisions of Section 81 to an agreement between a management company and the Wisconsin Winnebago Tribe. The *Koberstein* court said it must be guided by the rule enunciated by this Court which requires that Indian statutes must be given "a sweep as broad as their language". 762 F.2d at 617 [quoting *Central Machinery Co. v. Arizona State Tax Com'n*, 448 U.S. 160, 166 (1980)]. And, while the specific question confronted by the *Koberstein* Court involved a management company, the Court's holding articulated a much broader application of Section 81 by stating ". . . we hold that Section 81 governs transactions relative to Indian land for which Congress has not passed a specific statute." 762 F.2d at 619. The *Koberstein* decision not only broadly interpreted Section 81, as is required when construing legislation pertaining to Indian tribes[3], but construed Section 81 consistent with *In re Sanborn* and *Green*.

The court in *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company, et al.*, 616 F.Supp. 1200 (Minn. 1985), determined that a bingo management agreement was relative to Indian land, and described the interaction between the state law that generally prohibited gambling and tribal land as follows:

> The court next must turn to whether the bingo management agreements are

[3]See also, Argument in Section E, *infra*.

> "agreement[s] . . . relative to [Indian] land." A careful review of the management agreements shows them to be inextricably tied up in the property rights flowing from the establishment of the bingo operations on tribal trust lands. The very existence of the bingo operations arises from the Indian tribe's sovereignty over tribal trust lands which makes state gaming laws inapplicable to games on reservations. (citations omitted) This is the very reason why bingo can be profitably offered by the Community [Indian tribe]. *But for its land*, state law would not permit it.

Id. at 1218 (emphasis added).

Even the Seventh Circuit in the instant case has noted that:

> Congress has neither implicitly nor explicitly overruled section 81 and the statute continues to "govern[ ] transactions relative to Indian land for which Congress has not passed a specific statute." (citation omitted).

Altheimer & Gray v. Sioux Manufacturing Corporation, 983 F.2d 803 (7th Cir. 1993). *Altheimer* drew a distinction between the type of contract at issue in the instant case (a contract between a tribe and a manufacturer of latex medical products) and the type of contract at issue in *Pan Am* (a contract between a tribe and the managers of a gaming facility). In recognizing the difference, the *Altheimer* court

noted that, unlike gaming facilities, which depend for their operation on exemption from state civil laws by locating on a reservation, manufacturers of latex medical products need not locate on reservation lands in order to operate. *Id.* at 812.

Nonetheless, the District Court in the Eighth Circuit Cases in which Glenn A. Hall, Michael A. Mapes, and Fred Tribble are involved cited *Altheimer* in concluding that the arrangements for the sale or lease of gambling devices to the various tribes in question were not relative to Indian lands. *United States of America ex rel. Hall*, 1993 WL 246402 (D. Minn. May 27, 1993). Obviously, the very nature of arrangements to provide gambling devices are wholly dependant upon Indian land and could not exist outside of the reservation. That is, the gambling activities of the tribes must seek refuge from state civil laws by locating on the reservations. If it was not for the special status enjoyed by the Indian land, the tribes could not operate gambling casinos, nor could the defendants in the Eighth Circuit Cases sell or lease gambling devices to Indian tribes. Arrangements to sell or lease gambling devices clearly, therefore, must relate to Indian land within the scope and application of Section 81.

All of the prior decisions of this Court, as well as decisions of other lower courts, have upheld the broad application of Section 81 as originally intended by Congress. Any attempt to limit the scope and application of this Statute, as the Seventh Circuit has attempted to do, must be struck down, especially given the urgent need for a sweeping application of the statute today in the context of Indian gaming.

D. Administrative Interpretation of Section 81 Has Upheld the Broad Application of the Statute as Originally Intended by Congress.

Legislation is implemented by administrative agencies. Great weight attaches, therefore, to the interpretations and applications adopted by agencies charged with the administration of the legislation in question.[4]

The Department of Interior administers legislation relating to Indian tribes such as Section 81. One source of Interior Department policy can be found in the seminal work on Indian law, Felix S. Cohen's *Handbook of Federal Indian Law* (1982 ed.). In 1968 Congress directed the Secretary of Interior to have the *Handbook* revised and republished. *See Handbook* at ix. The 1982 edition of the *Handbook* is the result of that directive. Because of the Department's interest in the *Handbook*, the statements contained therein are a strong indication of Department of Interior policy. The *Handbook* describes 25 U.S.C. § 81 as prohibiting contracts between Indians and non-Indians unless approved.[5] It does not limit the application of Section 81 to land transactions.

Another indication of Department policy can be found in the House Report concerning the 1958 amendment to 25 U.S.C. § 81. It is clear from the House Report and the report from the Department of the Interior set forth therein, approving the proposed amendment, that the Department of the Interior interpreted Section 81 as requiring ". . . *all* contracts with Indian tribes relating to their lands . . . to be approved by the Secretary of the Interior and the

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[4]Norman J. Singer, *Sutherland Statutory Construction*, § 49.05 (Sands, 5th ed. 1992)

[5]*Id.*, Cohen at 318, n. 293.

Commissioner of Indian Affairs." *H.R. Rep. No. 2449, 85th Cong. 3d Sess. 1 (1958). [U.S. Cong. & Code 3961]* (emphasis added).

Most significantly, however, the Department of Interior, acting through the Assistant Secretary of Interior-Indian Affairs, recently issued a Memorandum to all Area Directors containing guidelines which the Area Directors are required to fully comply with in reviewing and approving all contracts, leases, subcontracts, assignments or agreements submitted after March 6, 1992, related to Indian gaming. The guidelines explicitly set forth the Department's interpretation and application of Section 81 to the effect that all contracts involving gambling equipment are relative to Indian lands. For example, among the types of contracts subject to Section 81 review and approval under these guidelines are "equipment lease" (Part C, subparagraph 13), "contract for lease or purchase of gaming equipment" (Part C, subparagraph 14), and "lease or agreement for gaming equipment" (Part C, subparagraphs 15 and 16). See *BIA Guidelines to Govern the Review and Approval of Gaming Contracts and Other Gaming Activities* (March 5, 1992) (the "Brown Guidelines")(App. ___).

E. Rules of Statutory Construction Applicable to Indian Legislation Support the Broad Application of Section 81 as Originally Intended by Congress.

Section 81 of United States Code, Title 25, is legislation that was passed for the benefit of Indians. Such legislation is to be liberally construed, and if doubtful expressions are contained in the legislation, they must be resolved in favor of Indians. *See Bryan v. Itasca Co.*, 426 U.S. 373, 392 (1976)

and *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 89 (1918). Statutory rules of construction also require that the foregoing canon be given the broadest possible scope. *DeCoutau v. District County Court*, 420 U.S. 425, 447 (1975).

A rule of construction that is not limited specifically to Indian legislation, but that is applicable here, is the rule that legislation is not intended to be confined to the particular application that was being contemplated at the time the legislation was passed. It is not unusual that as legislation ages, it is applied to circumstances that were utterly uncontemplated at the time of its passage. *See Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). The logic behind this rule, of course, is that as time passes and new factual situations arise which fall under prior existing legislation, Congress, having the power to amend such legislation to avoid such application, is deemed to intend its application.

In the case of Section 81, Congress clearly foresaw the need to protect Indians from unconscionable and improvident contracts. At the time, of course, Congress could not foresee that the persons who would attempt to make such contracts with Indians and Indian tribes would include providers of gambling devices and gambling management services, as well as Indian agents and attorneys. Nevertheless, over time, the courts have recognized the need to broadly construe Section 81 consistent with original Congressional intent and have, in fact, followed these rules of statutory construction to apply Section 81 in new factual contexts. These rules require that Section 81 be broadly interpreted in favor of increased, rather than decreased, protection of commercial relationships between Indians and non-Indians, and be applied to all contracts that are relative to Indian land, not merely "land transaction" contracts as the Seventh Circuit would attempt to so limit Section 81.

CONCLUSION

The decision of the Seventh Circuit in the instant case is contrary to the plain language of Section 81, the Congressional intent underlying it as expressed in the legislative history of Section 81, present day public policy, the prior pronouncements of this Court and other courts interpreting Section 81, the interpretation of Section 81 by the administrative agencies designated to implement it, and canons of statutory construction applicable to Indian law.

As evidenced by the Inspector General's Survey Report, Section 81 is perhaps needed more today by Indians and Indian tribes than when it was originally enacted. Today, instead of just attorneys and Indian agents taking advantage of Indians, there are a whole array of entities exploiting Indians and Indian tribes through the special protections available to gaming activities conducted on Indian reservations. Today, the consequences of such exploitation are even more severe than exploitation of years' past since today's exploitation robs Indians and Indian tribes of the ability to capture significant revenues for the betterment of their people after so many years of impoverishment.

This Court now has the historic opportunity to aid in redressing some of the wrongs of the past by enforcing a federal statute which has been in place since the beginning of our nation's history, a statute designed to prevent Indians and Indian tribes from entering into unconscionable and improvident contracts with others to the detriment of their people. In order to seize this opportunity, this Court should begin by granting Petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals. If this Court declines to do so, then Section 81 will be improperly and unnecessarily eviscerated and the exploitation

of Indians, especially in the area of Indian gaming, may unfortunately continue as it has throughout far too much of our nation's history.

If, in fact, it is the intent of this Court to allow the continuing erosion of Section 81 and the protections it was meant to afford to Indians and Indian tribes, then such a pronouncement should also be made explicitly by this Court, rather than allowing the same result to be accomplished by default through the actions of lower courts. At this critical juncture in the history of gaming on Indian lands, now is the time for a specific pronouncement in this area to be made and the United States Supreme Court should make it.

Respectfully submitted,

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Dated: November 10, 1993

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United States Department of the Interior

OFFICE OF THE INSPECTOR GENERAL
Washington, D.C. 20240

December 31 1992

MEMORANDUM

TO: The Secretary

FROM: Inspector General

SUBJECT: Final Survey Report for Your Information - "Implementation of the Indian Gaming Regulatory Act"

DISCUSSION: The subject report is the first in a series of reports on Indian gaming. The objective of this review was to determine whether Federal and state governments had taken appropriate action to implement the Indian Gaming Regulatory Act of 1988.

We found that Federal and state governments did not ensure that high stakes bingo and casino gambling on Indian reservations were properly established and adequately regulated. Various factors contributed to this serious lack of oversight of Indian gaming operations. First, many tribes had started gaming operations prior to passage of the Act; as such, there was insufficient lead time for the establishment of a regulatory process. In addition, the National Indian Gaming Commission (authorized by the Act) has directed its initial efforts to issuing regulations and not to monitoring Class II (high stakes bingo) operations, the Bureau of Indian Affairs lacked the staff and expertise to evaluate management and equipment leasing contracts in a effective manner, and some states have been reluctant to negotiate compacts with tribes for the establishment and control of Class III (casino) gambling. As a result, some gaming establishments are operating in direct violation of the Act, and substantial amounts of gaming revenues

that should have been realized by tribes are being diverted to companies hired to manage and equip the gaming operations. During our review, we identified gaming revenues of over $12 million that may have been diverted improperly from tribes to operators and suppliers, principally because of theft and mismanagement by contracted operators of gaming establishments.

Despite these problems, Indian gaming has had a positive impact on the economies of certain tribes and state governments. Unemployment has been reduced, and tribes have invested gaming profits in education, housing, health care, and community projects. However, we believe that Federal and state governments need to become more actively involved in the oversight and regulation of Indian gaming to ensure that the interests of Indian tribes are adequately protected.

We recommended that the Assistant Secretary for Indian Affairs, in coordination with the National Indian Gaming Commission, develop an action plan and oversight process for identifying and evaluating Class II and Class III operations; allocate sufficient resources to the process; and ensure that states and tribes are complying with the gaming oversight provisions of their compacts. Managements' response to the draft report identified various actions that were or would be taken to meet the intent of all three recommendations.

s/s Joyce N. Fleischman

for James R. Richards

Attachment
Prepared: Harold Bloom
Extension: 208-4252

U.S. Department of the Interior
Office of Inspector General

SURVEY REPORT

IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT

REPORT NO. 93-I-349
DECEMBER 1992

This report may not be disclosed to anyone other than the auditee except by the Assistant Inspector General for Administration, Office of Inspector General, U.S. Department of the Interior, Washington, D.C. 20240

United States Department of the Interior
OFFICE OF INSPECTOR GENERAL
Headquarters Audits
1550 Wilson Boulevard
Suite 401
Arlington, VA 22209

December 31, 1992

MEMORANDUM SURVEY REPORT

To: Assistant Secretary for Indian Affairs
Chairman, National Indian Gaming Commission

From: Assistant Inspector General for Audits

Subject: Final Survey Report on Implementation of the Indian Gaming Regulatory Act (No. 93-I-349)

INTRODUCTION

This report presents the results of our survey of the implementation of the Indian Gaming Regulatory Act. We performed the survey because allegations concerning contracts for gaming services indicated that excessive revenues were being realized by operating companies at the expense of the tribes and that other improprieties in certain gaming operations on Indian lands also existed.

Over 170 tribes have started high stakes bingo games and/or casino-type gambling, such as blackjack, poker, and slot machines. With the revenues received from gaming operations, some tribes have been able to build schools, hospitals, sewer and water systems, and other community facilities. Gaming revenues have also provided capital for financing new tribal industries. Further, gaming has provided employment for many Native Americans who live in economically depressed areas and overall has increased self-sufficiency on many Indian reservations.

However, our review concluded that there has been a lack of oversight of Indian gaming, which has adversely impacted the amount of proceeds being realized by some tribes involved in gaming operations. This occurred, in part, because the Act did not provide sufficient lead time for the Department of the Interior to establish a regulatory process for monitoring Indian gaming prior to the tribes' being given authority to proceed with gambling operations. Also by law, the Federal Government is severely limited in the amount of oversight it can provide over what is considered Class III gaming (casinos). In addition, the Bureau of Indian Affairs, the National Indian Gaming Commission, and some states have not been diligent or timely in the establishment and execution of oversight arrangements required by the Act to monitor casino gambling and bingo games. As a result, some gaming establishments are operating in direct violation of the Act, and Indian tribes may be losing significant income

because of fraud or abuse in an industry that is generating revenues of approximately $2 billion a year on Indian lands.

BACKGROUND

Historically, the majority of Indian reservations have been economically depressed and have experienced some of the highest rates of poverty, unemployment, and other adverse socioeconomic conditions in the country. During the 1980s, many Indian tribes became involved in gaming activities on Indian lands as a means of generating revenues for tribal governments. Consequently, after years of debate, the Congress passed the Indian Gaming Regulatory Act (Public Law 100-497, as amended) to provide policy and standards for the conduct of gaming on Indian lands. The Act was signed into law on October 17, 1988, and provides the regulatory framework for various forms of gambling on tribal lands. A primary purpose of the Act is to provide a statutory basis for tribal gambling activities as a means of promoting economic development, self-sufficiency, and strong tribal government.

The Act defines three classes of Indian gaming as follows:

- Class I gaming includes social or traditional gaming that is played in connection with tribal ceremonies or celebrations.

- Class II gaming includes bingo and, if played at the same location, pull tabs, lotto, punch boards, tip jars, instant bingo, and card games (such as poker) not played against the house when permitted by state law.

- Class III gaming includes card games, table games (such as blackjack and craps), slot machines, electronic or electromechanical facsimiles of games of chance, and parimutel wagering. Class III gaming is lawful on Indian lands only if it is conducted in conformance with a tribal-state compact that has been approved by

the Secretary of the Interior.

In Section 5 of the Act, the Congress established the National Indian Gaming Commission as the Federal agency with primary regulatory responsibility over Indian gaming operations. The Commission was included as part of the Department of the Interior but in reality operates as an independent agency. The primary role of the Commission is to issue regulations governing gaming activities, approve tribal ordinances for regulating Class II and Class III gaming, approve management contracts for Class II and Class III gaming, and monitor and regulate Class II gaming operations throughout the United States. The Commission is also responsible for investigating allegations of improper activities and conducting background investigations as necessary. When such investigations indicate a violation of Federal, state, or tribal statutes, the Commission is required to refer the matter to the appropriate law enforcement officials. In that regard, Section 17 of the Act requires the Attorney General to investigate activities associated with gaming authorized by the Act that may be a violation of Federal law.

The Act gave the Secretary of the Interior interim responsibilities for the supervision of Indian gaming until the Commission was fully organized and had established the regulations needed for oversight of Indian gaming. During this interim period, the Secretary delegated oversight responsibilities to the Assistant Secretary for Indian Affairs. These responsibilities included but were not limited to ensuring that background investigations on casino management officials are performed and reviewing and approving compacts between the tribes and the states and contracts between the tribes and management companies.

Sections 11 and 12 of the Act authorize Indian tribes to enter into management contracts for the operation of Class II and Class III gaming activities. Section 12

further states that the Commission may approve a management contract only if it determines that the contract provides for (1) adequate accounting procedures and monthly verifiable financial reports, (2) tribal access to daily operations, (3) a minimum guaranteed payment to the Indian tribe that has preference over development and construction costs, (4) a ceiling for the repayment of development and construction costs, (5) a contract term not to exceed 7 years, (6) termination provisions, and (7) a reasonable fee that does not exceed 40 percent of the net revenues. Tribes often engage the services of management companies to provide for the establishment and management of these facilities. Because of the potential for substantial profits (up to 40 percent of the net income) that can be derived from these lucrative gaming operations, we found that individuals or enterprises with no expertise in gaming or construction and unverified financial backing have at times been offering tribes up-front payments of as much as $1 million to sign management contracts. As of October 1, 1992, we estimated that well over 200 contracts for management, leasing, or supply services had been entered into for Class II and Class III operations.

The framework for regulating Class III gaming is structured in accordance with compacts between the tribes and the states in which the games are operated. Compacts may include (1) provisions concerning criminal and civil laws directly related to gaming, (2) provisions for monitoring and allocating jurisdiction between the state and the tribe, and (3) standards for operating and maintaining a gaming facility. Overall, the Indian Gaming Regulatory Act recognizes Indian sovereignty over gaming and that Indian tribes have the right to regulate gaming activities on Indian lands subject to the provisions of the Act. The states' regulatory role in this process generally includes monitoring and inspecting operations of the various casino games.

As of November 1992, 171 tribes had initiated 257 gaming operations, including 84 Class III and 173 Class II establishments (Appendix 3), with revenues from these operations growing significantly. For instance, the revenues generated from Indian gaming in Minnesota alone totaled approximately $900 million during 1991. Tribal gaming throughout the country has had a major economic impact on the self-sufficiency of Indian people. In that regard, a 1991 study conducted by the Minnesota Indian Gaming Association, an association of tribes with gaming operations in Minnesota, concluded that since 1984, when Minnesota's first Indian gaming casino opened, tribal governments throughout the state recognized Indian gaming as a means of achieving what Federal policy had failed to accomplish over the past hundred years in terms of self-sufficiency and economic independence for Native Americans. Tribes are investing gaming profits in education, housing, community projects, infrastructure improvements, health care, economic development, and increased law enforcement

OBJECTIVE AND SCOPE

The objective of the survey was to determine whether Federal and state governments had taken appropriate action to implement the Indian Gaming Regulatory Act of 1988. To accomplish our objective, we contacted officials and requested data from 10 of the 12 Bureau of Indian Affairs area offices (Appendix 2), and we interviewed officials from Bureau headquarters, the National Indian Gaming Commission, the Department of Justice, Indian tribes, and state governments. The survey was performed from September through October 1992 at the Bureau of Andian Affairs and National Indian Gaming Commission offices in Washington, D.C., and the Bureau's Minneapolis Area Office and one tribal casino. Our survey was made in accordance with the auditing standards issued by the Comptroller

General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances. Generally, our survey was limited to an overview of actions involved in establishing and monitoring Class II and Class III gaming and did not include reviews of gambling operations.

We also reviewed the Department of the Interior Annual Statement and Report, required the Federal Managers' Financial Integrity Act, for fiscal year 1991 to determine whether any reported weaknesses were within the objective and scope of our survey. We found that no weaknesses on the subject were reported by either the Bureau of Indian Affairs or the Office of the Secretary.

PRIOR AUDIT COVERAGE

Neither the Office of Inspector General nor the General Accounting Office has audited any Indian gaming operations or activities during the past 5 years.

RESULTS OF SURVEY

Approximately 260 gambling operations that generate revenues of $2 billion a year have been established on Indian lands with minimal or no effective oversight from Federal or state governments. As a result, substantial amounts of gaming revenues that should have been realized by the tribes are instead being siphoned off by enterprises hired to manage and equip the gaming operations. During our limited review, we identified situations where gaming revenues of over $12 million may have been improperly diverted from tribes to operators and suppliers, principally because of theft and mismanagement by contracted operators of gaming establishments.

The Indian Gaming Act of 1988 established a framework for joint Federal, state, and tribal control of

Indian gaming through the approval, execution, and monitoring of tribal and state compacts and management contracts. In addition, the United States Code (25 U.S.C. 81) requires that the Secretary of the Interior approve all Indian contracts or agreements relative to Indian lands. The Assistant Secretary for Indian Affairs has interpreted this section to include management and equipment leasing contracts. However, the National Indian Gaming Commission has not yet issued all necessary regulations or assumed any regulatory responsibility, the Bureau of Indian Affairs has failed to exercise adequate supervision during the interim period, and some states have been reluctant to negotiate compacts with tribes. Consequently, of the 84 Class III establishments initiated by tribes, 33 are operating without approved tribal-state compacts (Appendix 4), and 8 are operating without approved management contracts (Appendix 5). Also, of the 173 Class II gaming establishments, at least 24 do not have approved management contracts (Appendix 6). Further, many equipment leasing contracts have also not been approved by the Bureau.

The operation of a Class III establishment without an approved tribal-state compact is a violation of the Act and places the operation in jeopardy of closure by the Department of Justice. This situation occurred in Arizona in May 1992, when law enforcement officials raided five bingo hall operations and seized 750 video poker machines because tribal-state compacts had not been approved. Therefore, the potential exists for tribes that are operating Class III casinos without valid compacts to forfeit significant revenues. We have also been informed by Bureau officials that besides the lack of many tribal-state compacts and approved management contracts, there are many more unapproved equipment leasing, supply, and service contracts in existence. The Bureau did not have a system to keep track of these service contracts. Also, the tribes have been reluctant to provide this information to

the Bureau. We plan to identify the extent and the impact of unapproved service contracts in subsequent audits.

In addition to the unapproved compacts and contracts, we believe that many of the approved contracts do not comply with those provisions of the Act that require the tribes to receive a primary benefit from the gaming operation. Bureau officials said that contracts were approved if they were within the Act's broad guidelines relative to a maximum term of 7 years and a maximum fee percentage for the operators of 40 percent. Our survey showed, however, that economic evaluations of proposed operator costs were not being accomplished by the Bureau because it did not have a sufficient number of experienced personnel available in the field offices who could perform these evaluations or guidelines for performing financial analysis of contractor proposals. Therefore, the tribes may not have received an equitable share of revenue from the terms of the contracts. For example:

- We were informed by Bureau officials that a tribe may lose an estimated $4.5 million because of mismanagement on the part of the management company hired to operate its Class III casino. The Bureau of Indian Affairs did not approve the management contract because of controversaries surrounding the firm. According to Bureau officials, the tribe had $2 million in savings prior to hiring the management company. However, after 1 1/2 years of gross mismanagement by the company hired to manage the gaming operation, the tribe was $2.5 million in debt. The tribe has since filed a lawsuit against the management firm in an attempt to recover some of its losses.

- Information provided by Tribal officials indicated that a casino leasaed 172 slot machines from a company that, as the tribe later discovered, was owned by the casino manager and the tribal attorney. This lease was not submitted to the Bureau for approval.

Under the terms of the lease, the tribe paid the leasing company 37 percent of the gross income from those slot machines (the amount wagered less than amount of payback) each month for the rental of the machines. For the first 21 months of this 60-month closed-end[1] contract, the tribe paid rentals totaling over $2.5 million, which was over three times the estimated $800,000 acquisition cost of the equipment. The tribe discharged the casino manager after it learned of his involvement in the leasing company and hired a new manager who was attempting to cancel the remaining 39 months of the lease. The tribe may, however, still be liable for estimated monthly payments of $120,000 for the remaining 39 months if the contract cannot be canceled, or a total of $4.7 million. Consequently, this contract may end up costing the tribe an estimated $6.4 million more than if the equipment had been purchased outright. Further, the tribe received only a school bus as its share of gaming proceeds for the nearly 3 years the casino/bingo hall was run by the former manager because its 63 percent share of the gross revenue was used to pay operating costs and finance capital improvements. The leasing firm was also leasing equipment to at least two other Indian casinos. Those leases will be reviewed in subsequent audits.

- We were informed by Department of Justice officials that the owner of a business that provided check-cashing services for Indian casinos was indicted on a fraudulent check-cashing scheme that cost certain tribes at least $600,000. Ten Indian casinos in three states were victimized by this operation. The Bureau of Indian Affairs has no record of approving any of the contracts between the affected tribes and the check-cashing service. This check-cashing service was bonded for only $5,000, even though it was handling several hundred thousand dollars a week. If the Bureau had reviewed

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[1] Closed-end leases do not provide for a buyout at the end of the lease term.

these contracts prior to their execution, this type of loss may have been prevented.

- We found that a corporation that was hired to operate an Indian casino that had no tribal-state compact pled guilty to a felony count of operating illegal gambling on an Indian reservation. The corporation was fined $100,000 and forfeited $308,000 in cash and seized equipment. In addition, each of the corporation's six stockholders pled guilty to one misdemeanor count under the Indian Gaming Regulatory Act and was fined $500.

- A financial investigation conducted by a tribe disclosed that a tribal gaming operations manager had mismanaged, overpaid, and failed to document nearly $250,000 in expenses during the 1 1/2 years the manager was employed by the gaming operation. The investigation disclosed that the manager lived in an apartment that was inappropriately paid for by the casino, was directly involved with over $70,000 in unsupported or duplicate travel cost reimbursements, and authorized tens of thousands of dollars for unsupported petty cash payments. In addition, the manager did not obtain competitive bids for over $700,000 of construction work, which the financial investigation determined to be substantially overpriced.

- A tribal official told us that a casino manager hired by a tribe was allowed to have exclusive control over operation of a bingo hall and a casino. When the tribal oversight commitee attempted to assess operation of these activities, the casino manager refused to provide the information requested and the tribal Chairman did not support the committee's attempts to obtain this information. As a result, no one from the tribe but the tribal Chairman had any knowledge of casino operations. The casino manager kept his position for 2 years after he moved to the state capital. During the 2 years he was absent from casino operations, he was paid about $120,000 in salary and well over $80,000 for his personal expenses.

- Information provided by Departmental officials indicated that several tribes contracted with a single individual to manage a joint bingo hall operation. Apparently unknown to these tribes was the fact that the proposed manager had been accused by another tribal bingo hall of embezzling about $200,000 just prior to the tribes' signing the contract. The Bureau did not approve this contract; yet it took over 7 months to shut down the operation and file charges against the manager. Had the Bureau completed a thorough background investigation, as required by the Act, the theft allegation would have likely been called to the attention of tribal officials and the contract would not have been awarded.

- We found that an Indian tribe signed a contract with a management company to finance, build, and manage a $10 million gaming/retail complex, even though the company had no apparent source of funding and no expertise in construction or casino management. The tribe hired a private investigator to conduct a background investigation, but before the investigation was completed, the tribe signed the contract. According to one Federal official $5 million of the funding for this casino included "three negotiable instruments made out in German, drawn on a Swiss bank account, and payable to an Italian national." The international financial arrangements indicate the need for constant scrutiny to ensure that such arrangements are sound and protect the interests of Indian tribes.

Indian Gaming Regulatory Act

In May 1992, the Chairman of the Select Committee on Indian Affairs presented, to an oversight committee, testimony on implementation of the Indian Gaming Regulatory Act. The Chairman indicated that the National Indian Gaming Regulatory Act was passed as a compromise measure, which the Congress hoped would be mutually agreeable to the tribes and the

states. The 1987 Supreme Court decision on *Cabazon v. California*, which ruled that the states could not control gaming on reservation lands, and the fact that some tribes were already engaged in gaming were factors contributing to the passage of the Act by Congress. Although the Act designated the Department as responsible for regulating Indian gaming until the Commission was operational, the Department did not have time to set up a regulatory authority because tribes were already involved in gaming activities. Furthermore, the Act contains provisions that share responsibility for regulation of casino gaming between the National Indian Gaming Commission, the Secretary of the Interior (Bureau of Indian Affairs), the various states that have negotiated tribal state compacts, and the Indian tribes on whose land the gaming facility is operated (Appendix 7). The Act gives the Commission responsibility for approving tribal ordinances and management of contracts for Class II and Class III operations, whereas the Bureau is responsible for approving (1) the placing of land into trust for gaming purposes, (2) tribal-state compacts, and (3) equipment leasing and service contracts. In addition, according to the Act, the states are required to negotiate the compact with the tribe in which they agree on a plan to regulate Class III gaming activities. Hence, it is the states, not the Federal Government, that have primary oversight responsibilities over Class III gaming operations. Our review has shown, however, that states have often been reluctant to fulfill their responsibilities to regulate Class III gaming; consequently, many casinos have no independent oversight of operations, which increases the potential for fraud and abuse. This distribution of duties will require extensive coordination between the oversight entities, or some of the requirements may be inadvertently omitted to the detriment of the tribes.

Status of the Commission

The National Indian Gaming Commission is not yet fully operational 4 years after passage of the Act. Initial delays occurred because it took nearly 1 1/2 years to appoint the Commission Chairman and almost 1 year after that to appoint the two Commissioners. Further, the Commission has planned a cautious, methodical approcah to its regulation of Indian gaming. Its first priority was to promulgate policy regulations, leaving management oversight as a Bureau responsibility. Commission members said that they soon hoped to finalize the last four of the total of six sets of regulations and then to direct their efforts to regulation. The Chairman of the Commission recently told the National Indian Gaming Association that Indian gaming would be better regulated than any other form of gaming in the country. He said that he expects the Commission to begin full operation by the end of 1992. However, our review showed that it may be at least an additional year until the Commission is fully operational. When operational, the Commission will investigate allegations of improper activities, conduct or cause to be conducted background investigations as necessary, and review and approve contracts between tribes and management companies.

In addition, the Commission will have operational oversight responsibility for all Class II operations and will collect fee assessments from those facilities to pay for the Commission's operations. In becoming operational, the Commission intends to use its $3 million budget and its estimated staff of 24 to oversee 173 Class II Indian gaming operations across the country. In contrast, we learned that the Nevada Gaming Commission, which oversees about 350 gaming operations in Nevada, has an $18 million budget and 394 employees. The New Jersey gaming regulators have responsibility for 12 gaming operations in Atlantic City and have a $60 million budget and 985 employees.

State Government Actions

Some states have been reluctant to negotiate compacts with Indian tribes because of insufficient state funding for regulatory activities and an expressed aversion to becoming involved in the internal affiars of tribal operations. The Act requires states to negotiate compacts with tribes in good faith. However, as of August 16, 1992, 16 lawsuits had been filed by tribes against 15 states for the failure to complete negotiations.[2] Consequently, at least 33 Class III gaming establishments are operating without approved compacts and an independent regulatory process.

Departmental Oversight

The Department was not prepared for nor did it anticipate its role in supervising Indian gaming. It had no lead time to establish oversight capability because many tribes were already operating casinos and bingo halls at the time the Act was passed. Also, the Department said that it believed the Commission and states would be the primary regulators. As a result, the Department's planning and oversight activities did not progress at a sufficient pace to meet the needs of the tribes that were expediting the establishment of gaming operations. For example, as of February 1992, Indian tribes in Minnesota had 13 casinos and 15 bingo halls in operation, with over 9,189 slot machines and 494 blackjack tables and annual revenues estimated at $1.2 billion. Also, during this period, tribes in the States of Arizona, California, Connecticut, Michigan, Montana, South Dakota, Washington, and Wisconsin instituted sizable gaming operations. The total amount realized from Indian gaming operations in 1992 is estimated to be $2 billion. However, it was not until December 1991

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[2] On October 24, 1992, the Congress enacted a bill that allows Indian gaming to resume in Montana for a period of 6 months, while the tribes and the state negotiate compacts.

that the Secretary established the Task Force on Indian Gaming Management and not until March 1992 that the Assistant Secretary for Indian Affairs issued the Task Force recommendations and additional guidelines for reviewing contracts, leases, subcontracts, assignments, or agreements submitted after March 6, 1992. Therefore, for 41 months (between October 1988 and March 1992), minimal formal guidance was provided to the Bureau area offices, and neither the Commission nor the Bureau was prepared to provide the tribes financial advice or assistance.

With little or no Federal guidance and oversight, many of the tribes were in a disadvantageous position when negotiating with companies that were hired by the tribes to manage gaming operations. This resulted in these companies' often taking advantage of the tribes by entering into inequitable agreements and contracts.

Recent Bureau Actions

At the time of our review, the Bureau was planning to create the Office of Indian Gaming Management. The Congress has provided funds of $550,000 and authorized the Bureau to reprogram additional funds to provide a fiscal year 1993 budget of $1.5 million for the Office of Indian Gaming Management. The Office will have regulatory responsibility and will be created in accordance with the Secretary's February 29, 1992, directive. The purpose of the Office will be to address and remedy problems related to unapproved gaming management contracts, conditional approval of management contracts without completion of background investigations, unapproved per capita distributions, approval of leases and assignments without compliance with environmental requirements, off-reservation land purchases, and other related gaming matters. According to the Bureau's justification, the Office will consist of 12 "highly skilled" individuals who have expertise in one or more of the following areas: tribal government, con-

tracting, realty, accounting, financial analysis, legal analysis, data/automated data processing, criminal investigations, and the environment.

Conclusion

Despite the significant problems related to Indian gaming, Indian gaming has had a positive impact on the economies of certain Indian tribes and state governments. For example, casinos and bingo halls in Iowa, Michigan, Minnesota, and Wisconsin have employed over 12,300 people, including 4,000 Indians. Because of such benefits, many of the tribes allow gaming halls and casinos to operate, even though they are aware that the operations are not in compliance with the Act. However, although some progress has been made in complying with the Act, Federal and state governments need to become actively involved in the oversight and regulatory process to ensure that Indians are the primary beneficiaries of gambling on Indian lands. Therefore, immediate action is needed to ensure that fair and equitable agreements are negotiated which protect the interests of Indian tribes and that effective enforcement mechanisms are in place and operating.

Recommendations

We recommend that the Assistant Secretary for Indian Affairs, in coordination with the Chairman of the National Indian Gaming Commission:

1. Develop an action plan and oversight process that will (a) identify all Class II and Class III gaming operations; (b) prioritize gaming operations for review, concentrating on activities with unapproved compacts and management contracts; (c) expedite completion of approved management contracts and state-tribal compacts where such contracts and compacts have not been finalized; and (d) provide an orderly transition of responsibility for oversight of gaming from the Bureau

to the Commission.

2. Ensure that the states and tribes are complying with gaming oversight provisions of their compacts as these provisions relate to the conduct of games, payout of machines, independent audits of financial records, and licensing of employees involved in gaming activities.

3. Allocate sufficient resources to the oversight and monitoring of Indian gaming to ensure that the Department of the Interior meets its responsibilities under the Indian Gaming Regulatory Act of 1988.

Bureau of Indian Affairs Response

The December 4, 1992, response from the Assistant Secretary for Indian Affairs (Appendix 8) indicated concurrence with Recommendations 1 and 3 and nonconcurrence with Recommendation 2. The Bureau also provided comments on the draft report, which we considered in finalizing the report.

Recommendation 1. The Bureau stated that it had established a plan to identify all Class II and Class III gaming operations and to prioritize gaming operations for review. The Bureau also stated that its oversight of tribal gaming operations is "ongoing" and that it has scheduled several reviews of gaming operations designed to bring the operations "into compliance with the Indian Gaming Regulatory Act." The Bureau further stated that it has held periodic meetings with the Commission to provide for the "orderly transfer" of gaming functions to the Commission and that these meetings "will continue" through the "transition of gaming responsibilities."

Recommendation 2. The Bureau stated that the Act specifically "reposed total responsibility for regulation of gaming related activities on the tribes and the states by providing the compact process." The Bureau stated, however, that it would work with tribal and state offi-

cials to resolve gaming-related problems and improve tribal-state relationships. The Bureau also stated that it would work with the National Indian Gaming Association, the North American Gaming Regulators Association, the National Attorneys General Association, and other related organizations to improve tribal-state relations as they pertain to gaming operations.

Recommendation 3. The Bureau stated that it has developed an forwarded to the Department for approval an organizational structure to oversee the Department's gaming responsibilities. According to the Bureau, this structure will consist of 15 individuals and will be responsible for "policy development and oversight actions to insure that tribal-state compacts, distribution of per capita payments, land acquisitions for gaming purposes, and leases collateral to primary gaming activities are in compliance with the Act."

National Indian Gaming Commission Response

Even though our recommendations were addressed to the Bureau, the Chairman of the National Tribal Gaming Commission expressed general agreement with the recommendations in a December 4, 1992, memorandum (Appendix 9). The Commission's comments were also considered in preparing our final report.

Office of Inspector General Comments

The Bureau's response was sufficient for us to consider Recommendations 3 resolved and implemented, and additional information is needed for Recommendations 1 and 2 (see Appendix 10). Although the Bureau did not concur with Recommendation 2, it provided alternative actions to meet the intent of the recommendations.

In accordance with the Departmental Manual (360 DM 5.3), please provide us with your written comments to this report by March 5, 1992. Your comments should

provide the information requested in Appendix 10.

The legislation, as amended, creating the Office of Inspector General requires semiannual reporting to the Congress on all audit reports issued, the monetary impact of audit findings (Appendix 1), actions taken to implement audit recommendations, and identification of each significant recommendation on which corrective action has not been taken.

s/s

Harold Bloom

APPENDIX 1

CLASSIFICATION OF MONETARY AMOUNTS

Finding	Funds To Be Put To Better Use*
Gaming Revenues Lost	$12.4 million

* Amount represents non-Federal funds.

APPENDIX 2

BUREAU OF INDIAN AFFAIRS OFFICES CONTACTED

Office	Location
Aberdeen Area Office	Aberdeen, South Dakota
Albuquerque Area Office	Albuquerque, New Mexico
Anadarko Area Office	Anadarko, Oklahoma
Billings Area Office	Billings, Montana
Eastern Area Office	Arlington, Virginia
Minneapolis Area Office	Minneapolis, Minnesota
Muskogee Area Office	Muskogee, Oklahoma
Phoenix Area Office	Phoenix, Arizona
Portland Area Office	Portland, Oregon
Sacramento Area Office	Sacramento, California

TRIBES WITH GAMING OPERATIONS

Area Office	Number of Tribes	Gaming Operations		
		Class II	Class III	Total
Aberdeen	16	11	11	22
Albuquerque	10	9	8	17
Anadarko	21	19	0	19
Billings	5	3	15	18
Eastern	21	18	3	21
Minneapolis	30	49	33	82
Muskogee	10	17	0	17
Phoenix	12	7	2	9
Portland	23	20	6	26
Sacramento	23	20	6	26
Total	171	173	84	257

APPENDIX 4

STATUS OF TRIBAL/STATE GAMING COMPACTS

Area Office	Total Class III Gaming	Without Bureau Approved Compacts	With Approved Compacts
Aberdeen	11	2	9
Albuquerque	8	7	1
Anadarko	0	0	0
Billings	15	13*	2
Eastern	3	0	3
Minneapolis	33	7	26
Muskogee	0	0	0
Phoenix	2	0	2
Portland	6	4	2
Sacramento	6	0	6
Total	84	33	51

* Thirteen gaming operations are temporarily approved by an Act of Congress.

STATUS OF MANAGEMENT CONTRACTS FOR CLASS III GAMING ESTABLISHMENTS OPERATED BY CONTRACTORS

Area Office	Total Class III Gaming	Less Establishments Operated by Tribe	Balance Requiring Contracts	Approved Contracts	Without Approved Contracts
Aberdeen	11	6	5	1	4
Albuquerque	8	6	2	2	0
Anadarko	0	0	0	0	0
Billings	15	11	4	1	3
Eastern	3	1	2	2	0
Minneaopolis	33	27	6	6	0
Muskogee	0	0	0	0	0
Phoenix	2	2	0	0	0
Portland	6	4	2	2	0
Sacramento	6	0	6	5	1
Total	84	57	27	19	8

APPENDIX 6

STATUS OF MANAGEMENT CONTRACTS FOR CLASS II GAMING ESTABLISHMENTS OPERATED BY CONTRACTORS

Area Office	Total Class II Gaming	Less Establishments Operated by Tribes	Balance Requiring Contracts	Approved Contracts	Without Approved Contracts
Aberdeen	11	8	3	1	2
Albuquerque	9	5	4	2	2
Anadarko	19	14	5	1	4
Billings	3	1	2	1	1
Eastern	18	9	9	9	0
Minneaopolis	49	36	13	9	4
Muskogee	17	13	4	3	1
Phoenix	7	4	3	0	3
Portland	20	15	5	4	1
Sacramento	20	8	12	6	6
Total	173	113	60	36	24

OVERSIGHT OF INDIAN GAMING AS SPECIFIED IN THE INDIAN GAMING REGULATORY ACT

Commission	Bureau of Indian Affairs	States	Tribes
· Issue regulations	· Approve tribal land used for casinos	· Establish and implement compact with tribe	· Establish and implement compact with state
· Approve tribal ordinances	· Approve compacts	· Provide day-to-day casino oversight	· Make per capita distribution
· Approve management contracts	· Approve leases, supply and service contracts		· Provide day-to-day casino oversight
· Conduct background investigations on management officials	· Approve per capita distributions		
· Refer allegations			
· Monitor and regulate Class II gaming			

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Dec 04 1992

Memorandum

To: Assistant Inspector General for Audits

From: Acting Assistant Secretary - Indian Affairs *s/s*

Subject: Response to Draft Survey Report on Indian Gaming Activities (Assignment No. C-IA-BIA-007-92)

INTRODUCTION

This memorandum presents the response of the Bureau of Indian Affairs (BIA) to the above referenced draft survey report (Survey) dated October 29, 1992. Our response is provided in two parts: Part I consists of the BIA's comments relative to the survey report's factual analysis and conclusions made regarding Indian gaming operations. Part II responds to the OIG's recommendations and includes explanatory information.

PART I

The BIA is aware that a number of Class III gaming establishments are operating without approved compacts and management contracts. On page 5 of the Survey, the Office of the Inspector General (OIG) reports that "well over 200 contracts have been entered into for gaming operations." The BIA cannot verify this number. BIA survey data indicates the number to be 30 instead of 27 operations without approved contracts and 48 instead of 50 operations without approved management contracts. BIA survey data

indicates 6 of the 48 are conditionally-approved management contracts.

The BIA does not have information to support the report's statement that gaming revenues of over $12 million may have been improperly diverted from tribes in favor of operators and suppliers.

In 1984, the BIA issued guidelines to the area directors in response to the rapid increase in high stakes bingo operations being opened by the tribes. These guidelines were revised in April 1985, and again on April 7, 1986. All of the guidelines were developed to govern the review and approval of bingo management contracts only and not casino-type gaming since Class III type gaming was not yet authorized. The 1986 guidelines continued to be used even after passage of the Indian Gaming Regulatory Act in 1988 (IGRA) even though by this time, many of the tribes had expanded their bingo operations to include Class III type gaming.

The statement that many of the approved contracts do not comply with provisions of the IGRA which require the tribes to receive primary benefit from the gaming operation is accurate. The primary reason this is true is because a number of these contracts were approrved prior to passage of the IGRA and did not contemplate the requirements contained in the IGRA. Moreover, the majority of these contracts were for management of high stakes bingo operations. Since the passage of the IGRA in 1988, new forms of high tech gambling have been developed which were not available at the time these contracts were approved. The manufacturers of these new games promoted them aggressively as benign facsimiles of bingo which tribes believed were authorized as Class II type gambling. Consequently, tribes did not see the need to seek modifications to existing approved contracts to include them. Given the infancy of the IGRA and the lack of definitions classifying these new games, the BIA did not feel it had a basis on which it could properly

disallow their use. Presently, there are several ongoing court cases which will, when finally decided, uphold or reject the NIGC's definitions of Class III gaming as being consistent with the IGRA.

The BIA believes that the survey report did not accurately portray the BIA's responsibilities. On page 4 the Report Survey states that the BIA has responsibility for approving tribal gaming ordinances until such time as the NIGC becomes fully operational. The IGRA does not give the Bureau independent authority to approve ordinances. Section 10 of the IGRA is clear that the Secretary can exercise only those authorities he had on the day before the enactment of the IGRA. As such, the BIA only has authority to approve tribal gaming ordinances if the tribe's governing documents require review and approval by the Secretary or his designated representative.

The survey report, on page 15, also contains inaccurate statements relative to certain responsibilities under the IGRA. The Report states: "The Act gives the Commission responsibility for approving tribal ordinances and management contracts for Class III operations, whereas the BIA is responsible for approving (1) the placing of land into trust for gaming purposes, (2) tribal-state compacts, and (3) management contracts." It is true that the NICG has responsibility for approving gaming ordinances and Class III management contracts. But, the NIGC *also* has responsibility to approve Class II management contracts. Once the NIGC is operational, the BIA will no longer have authority or responsibility for approval of any management contracts. The BIA will, however, have continued responsibility for the approval of off-reservation fee-to-trust acquisitions for gaming, approval of per capita distribution plans, approval of business leases and other agreements, approval of tribal-state compacts, and approval of any organic documents that require Secretarial approval. The BIA

will also have continued responsibility for providing technical assistance to the tribes, at their request, for approval of credit and financing requests, and training as deemed appropriate and requested by tribes and BIA staff, and for environmental reviews as may be appropriate or necessary.

The BIA concurs that Congress, in passing the IGRA in 1988, did not give the Department of Interior (Department) sufficient lead time to establish a regulatory authority before allowing tribes to begin gaming activities. With the passage of the IGRA, most assumed that regulation of Indian gaming would easily be accomplished. It was expected that the NIGC would be established quickly and regulations defining the scope of gaming allowed would be developed immediately. In retrospect, everyone would have been better served if an appropriate transition time had been established. Nonetheless, the BIA has established a regulatory capability to address the obligations set forth in the IGRA. The BIA continues to go forward.

Moreover, the tribes were also expected to comply with all of the requirements of the IGRA, even though they frequently voiced a lack of real understanding of the Act. Economic pressure to take advantage of gaming as an economic enterprise without significant gaming expertise too often forced tribes to negotiate contracts with operators under difficult and unfair circumstances. No one foresaw the implications and rapid expansion of high stakes gaming and consequently never considered the need for a moratorium to allow time for the logistical planning and establishment of the regulatory process.

The BIA agrees that states may appear to be reluctant to fulfill certain compact requirements. A result is that some casinos may have little or no oversight of operations by the state. Some states may have resisted negotiating compacts with Indian tribes because of insufficient state funding for regulatory activities and an expressed aversion to becoming

involved in the internal affairs of tribal operations. The BIA, however, does not believe these reasons constitute the total basis for the state's reluctance to fulfill their compact requirements. The IGRA limits the extent of BIA involvement in the compact process. The BIA agrees that states and tribes should work together to provide more regulatory services, but it is not the BIA's function to intervene on either side in the compact process, or even to be involved in the negotiations between two governmental entitites.

The BIA agrees that immediate action is needed to ensure that fair and equitable agreements are negotiated which protect the interests of Indian tribes, and, that effective enforcement mechanisms are in place and operating. To the extent feasible, the BIA will assist tribes, at their request, and provide such expertise and resources deemded necessary to enable tribes to negotiate on an equal basis with prospective contractors and operators. To this end, the BIA has established a Gaming Management Office to ensure that applicable laws and regulations are enforced, and the interests of the tribes are protected. The BIA gaming management office will employ staff with the necessary qualifications to carry out this reponsibility.

According to BIA data and information, $61.1 Million in Direct Loans, Guaranty Loans, and Indian Business Development Grants have been provided to 28 gaming enterprises. The repayment rate for these loans is exceptionally high and only one loan is currently delinquent. This loan is being modified to reflect problems that have arisen as a result of construction delays. The purpose of the Indian Financing Act is to provide economic assistance to Indian enterprises.

The BIA appreciates the OIG's comments regarding the positive investments and activities the tribes are funding with gaming revenues. The opportunity to break out of the poverty cycle is one that tribes have not been provided very often. Congress clearly intended this opportunity when they promoted gaming as a

viable economic vehicle for the tribes. The BIA's support of tribal gaming operations through loans or guaranties must continue, especially in light of the positive effects such as creation of job opportunities, reductions in public assistance and the overall opportunities for a brighter future.

Revenue generated by Indian gaming establishments has, as the survey report states, provided a positive and viable source of funding for Indian tribes. Tribes have enhanced their governmental systems, increased and enhanced reservation infrastructures, built day care centers, fire departments, water and sewage treatment facilities, provided employment opportunities for Indians and non-Indians, provided educational and other training opportunities for members, and provided for investment in other economic development ventures, including purchasing additional land for the tribes.

PART II

RECOMMENDATION 1: Develop an action plan and oversight process that will (a) identify all Class II and Class III gaming operations; (b) prioritize gaming operations for review, concentrating on illegal and unapproved activities; and (c) provide an orderly transition of responsibility for oversight of gaming from the BIA to the NIGC.

RESPONSE: The BIA concurs. Since March 1992 the BIA has initiated a series of actions to identify all Class II and III gaming operations and to prioritize gaming operations for review. An action plan has been established, setting forth objectives and time lines for completion. The plan is updated and amended as new tasks are added or completed and to account for additional or decreased staff.

Additionally, oversight is ongoing. The BIA has, on a regular basis, identified changes in the gaming activity and provided assistance to the BIA staff and the tribes regarding changes in activity. The BIA is working

closely with the OIG to share information regarding identified games, updating of information regarding contracts, compacts and management firms.

The Central Office gaming staff has responded to area, field and tribal requests for technical assistance and training on gaming management issues and problems. Central Office gaming staff has scheduled several on-site visits to assist area/field staff with review of on-going gaming operations and to develop corrective/remedial actions to bring such operations into compliance with the IGRA.

The BIA's plan to provide for the orderly transfer of gaming functions to the NIGC, has consisted of periodic meetings between Central Office and NIGC staff to discuss mutual concerns, problems and the eventual transfer of primary gaming functions. Central Office staff have begun the collection and filing of management contracts, ordinances and related documents to prepare such documents for easy transfer to the NIGC. Meetings will continue to be held with NIGC staff to provide for an orderly transition of gaming responsibilities.

RECOMMENDATION 2: Ensure that the states and tribes are complying with gaming oversight provisions of their compacts as these provisions relate to conduct of games, payout of machines, independent audits of financial records and licensing of employees involved in gaming activities.

RESPONSE: The BIA does not concur. The BIA believes the IGRA specifically resposed total responsibility for regulation of gaming related activities on the tribes and the states by providing the compact process. We believe the IGRA provided both the tribes and states an equal opportunity and responsibility as sovereign governments to insure that compact provisions are enforced and complied with by both sides. BIA involvement to insure compliance with compact provisions would be difficult and impractical.

To the extent feasible, the BIA is willing to work with

tribal and state officials to facilitate meaningful discussions on problematic issues and to enhance the tribal-state relationship. In addition, the BIA will interact/liaison with the National Indian Gaming Association, the North American Gaming Regulators Association, the National Attorneys General Association and other gaming industry-related organizations to improve tribal-state relations as such pertain to gaming operations.

RECOMMENDATION 3: Allocate sufficient resources to the oversight and monitoring of Indian gaming to ensure that the Department meets its responsibilities under the IGRA.

RESPONSE: The BIA concurs. The BIA has responded to the Secretary's Directive to establish a regulatory unit within the BIA to oversee the Department's gaming-related responsibilities by developing the required justification to authorize an organizational modification. The organizational modification including staffing patterns and functional statements have been forwarded to the Department for review and approval. Position descriptions, office space acquisition, budget projections and other logistical plans have been finalized and are capable of immediate implementation upon approval of the organizational modification. A staff of 15 people is proposed and is considered to be sufficient to carry out the Department's residual responsibilities under the IGRA upon transfer of primary gaming functions to the NIGC. The small staff will carry out policy development and oversight actions to insure tribal-state compacts, distribution of per capita payments, land acquisitions for gaming purposes, and leases collateral to primary gaming activities are in compliance with the IGRA.

Upon approval of the organizational modification establishing the Indian Gaming Management Office, permanent qualified staff will be recruited and selected. It is anticipated that the permanent office will be established in the very near future and the BIA can

move forward to staff the Office. It is anticipated that a number of positions will be filled by the end of January 1993. The office will be fully operational by May 1993.

The responsible person for this action is Hilda Manuel, Acting Staff Director, Indian Gaming Management Office. Ms. Manuel can be reached at (202) 219-0994.

APPENDIX 9

NATIONAL
INDIAN
GAMING
COMMISSION

December 4, 1992

To: Harold Bloom
Assistant Inspector General for Audits

From: Anthony J. Hope, Chairman *s/s*
National Indian Gaming Commission

Subject: Draft Survey Report on Indian Gaming Activities

This responds to your request to provide you with our written comments on the Draft Survey Report on Indian Gaming Activities, including whether the National Indian Gaming Commission agrees or disagrees with the findings and recommendations contained in the Report.

The Commission shares the concerns expressed in the Report that some tribal gaming operations are not fully complying with the Indian Gaming Regulatory Act (IGRA) and that some tribes may be losing revenues because of fraud or abuse. The Commission also agrees that everyone involved in the regulation and oversight

of Indian gaming, including the tribes themselves, can do a better job in insuring compliance with the IGRA. The Report assumes, however, that the Secretary of the Interior is vested with broad authority to regulate all Indian gaming. Furthermore, the Report suggests that the Commission could be doing more to regulate Indian gaming than promulgate regulations.

In the introductory paragraph, the Report states

> . . . the Act did not provide sufficient lead time for the Department of the Interior to establish a monitoring and oversight capability prior to the tribes' being given authority to proceed with casino gaming

This statement fails to recognize some basic facts:

(1) Indian gaming existed prior to the passage of the IGRA;

(2) Indian gaming was not authorized and created by the IGRA but was subjected to regulatory oversight and control;

(3) Indian gaming was and continues to be primarily the responsibility of the tribes; and

(4) the Justice Department (U.S. Attorneys and FBI) were given authority to investigate and prosecute violations of the IGRA.

In addition, the Report uses terms and attributes authorities and responsibilities that are not always consistent with the IGRA and the regulations. For example:

- The Report uses the term "casino gaming" to refer to both class II and class III gaming (page 2).

- The Report attributes class III contract approval to both the Commission and the BIA (page 15). Once the Commission's management contract regulations take effect, the Chairman will have the exclusive authority to review and approve all gaming management contracts.

- Contrary to the Report, the Commission will not "conduct background investigations on casino

management officials (page 17 and 27).

The Secretary of the Interior's interim authority to regulate Indian gaming activities is limited to the authority he exercised prior to the enactment of the IGRA. See 25 U.S.C. § 2709. That authority is limited to reviewing gaming contracts under 25 U.S.C. § 81 and leases of Indian land under 25 U.S.C. § 415. The authority of the Secretary to monitor Indian gaming and to take enforcement actions for violations of the IGRA acting pursuant to sections 81 and 415 is far from certain.

The Commission strongly disagrees with the Report's conclusion at page two that the Commission has not been diligent in exercising its responsibilities under the IGRA. The Report states (at page 16) that the Commission is not yet fully operational four years after passage of the IGRA. The Report acknowledges the delays in the appointment of the Commissioners, but appears to be critical of our "cautious, methodical approcah to [the] regulation of Indian gaming." This leaves the erroneous impression that either: (1) there was another regulatory approach available to the Commission other than rulemaking or (2) the Commission is taking too long to issue regulations.

The IGRA clearly recognized that the Commission would need to promulgate regulations before it could begin to regulate. Thus, Congress vested in the Secretary of the Interior the interim authority to regulate Indian gaming "until such time as the Commission is organized and prescribes regulations." 25 U.S.C. § 2709. More importantly, if the Commission had proceeded to carry out its responsibilities under the IGRA without first engaging in rulemaking, it would have been in violation of the Administrative Procedure Act, 5 U.S.C. § 553, and all of the Commission's actions would be subject to challenge. The Commission proceeded in the only lawful manner available.

Since the appointment of the third Commissioner in April of 1991, the Commission has promulgated six sets

of *substantive* regulations (not policy regulations as the Report states) concerning: fee assessments, definitions, tribal ordinances, Privacy Act, compliance and enforcement, and management contracts. The Commission has promulgated these essential regulations in an efficient and timely manner. It is doubtful that the Commission could have proceeded any faster in the promulgation of regulations unless it had been vested with emergency rulemaking authority. The fee assessment and definition regulations are in effect, and the final regulations on tribal ordinances, Privacy Act, and compliance and enforcement are now under review at the Office of Management and Budget. The Commission anticipates completing its work on the management contract regulations -- the last essential set of regulations that will enable the Commission to become operational -- by December 15, 1992.

Promulgating regulations is but one of many vital functions the Commission has accomplished since the appointment of the Chairman in May 1990. Like any new agency, the Commission has had to contend with many necessary but time-consuming tasks, such as acquiring office space, furniture, equipment, supplies, and personnel and developing operating policies, procedures and systems. Moreover, the Commission members and staff have met extensively with Members of Congress and their staffs, Indian gaming tribes, Indian gaming associations, state gaming regulators, governors, state attorneys general, federal, state, and tribal law enforcement agencies, United States Attorneys, and many others. These meetings have been vitally important. We have educated others on the IGRA and the role of the Commission and have developed invaluable relationships with all those that have a role in implementing the IGRA and making it work as Congress intended.

The Report also fails to recognize that policing tribal-state compacts falls to neither the Commission nor the Secretary. That is the responsibility of the tribe and the

state. Thus, the IGRA provides that a compact could include a provision concerning remedies for breach of the agreement, 25 U.S.C. § 2710(d) (3) (C) (v). The IGRA also vests the U.S. district courts with jurisdiction over actions brought by a tribe or a state to enjoin class III gaming activities that are conducted in violation of a tribal-state compact. Section 2710(d) (7) (A) (ii).

Although they appear to be directed to the BIA rather than to the Commission, we have reviewed your specific recommendations and offer the following comments:

1. (a) The BIA has told the Commission that it will provide this information.
   (b) The Commission would welcome whatever information the BIA has that would help the Commission prioritize gaming operations for review. Additionally, information regarding class III operations should be provided to the relevant state authorities and to the Department of Justice.
   (c) The Commission will be prepared to assume its oversight responsibilities for class II gaming as soon as its regulations are effective. The Commission would welcome whatever additional information and assistance the BIA can provide.
2. The Commission does not have the responsibility or authority to ensure that the states and tribes are complying with gaming oversight provisions of their compacts.
3. This comment does not apply to the Commission; it deals with the allocation of Department of the Interior resources.

We want to thank the you and the Inspector General for sharing the draft of your proposed Report with us in advance. We hope you find our comments helpful.

Should you have any questions or want to discuss the Report or our observations further, please call Fred Stuckwisch or me at 202/632-7003.

STATUS OF AUDIT REPORT RECOMMENDATIONS

Finding/Recommendations Reference	Status	Action Required
1	Management concurs; additional information needed.	Provide a copy of the Bureau's action plan to identify all Class II and Class III gaming operations and to prioritize gaming operation for review.
2	Management concurs; additional information needed.	Provide an action plan for the Bureau's efforts to facilitate meaningful discussions on problematic issues and to improve tribal-state relationships, including target dates and titles of officials responsible for implementation.
3	Implemented.	No further action is needed.

ILLEGAL OR WASTEFUL ACTIVITIES SHOULD BE REPORTED TO THE OFFICE OF INSPECTOR GENERAL BY:

Sending written documents to: Calling:

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Office of Inspector General
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Arlington, Virginia 22210

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Mar 6 1992

Memorandum

To: All Area Directors

From: Assistant Secretary - Indian Affairs *s/s*

Subject: Indian Gaming

Attached are two documents for your review and action. The first document is Secretary Lujan's Directive on Indian Gaming Management, dated February 28, 1992. This directive sets forth very specific steps and actions pertaining to Indian Gaming.

The second document, dated March 5, 1992, are the guidelines to govern approval of gaming contracts and other gaming activities. These guidelines replace earlier procedures, issued April 7, 1986.

You should carefully consider these documents and distribute them to appropriate staff, with instructions that they likewise read and implement the directives. These two new documents represent the guiding principles from this date forward. Area Directors and Superintendants will be expected to comply fully with all procedures and requirements. Additionally, please distribute this information to the Tribes within your jurisdiction.

You will note on page 2, paragraph E, of Secretary Lujan's Directive that the Bureau of Indian Affairs (BIA) has been mandated to establish a regulatory unit within the BIA to fulfill the Secretary's order. Such an organizational unit represents a permanent, long term capability on the part of the BIA. It will be brought into existence as soon as possible. In the meantime, a Gaming Action Team (Team) is being formed to start

implementing these directives. The Team will also do the organizational work necessary to bring this new unit into existence. Ms. Hilda Manuel is the Interim Director of the project and two people have been detailed to the Central Office to begin this short term task. Other individuals are being identified to join the Team unit in the near future.

As soon as the Team develops an action plan, checklists and other tools, and address issues as they arise, they will be shared with you. Additionally, the Team will be developing a training program and instructional memoranda for use in the BIA. Training plans will be set up in the future.

Ronal Eden, Director of Tribal Services, is my principle lead official in this project and will be responsible for ongoing activity. Questions and comments should be directed to his office.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 5 1992

Memorandum

To: All Area Directors

From: Assistant Secretary - Indian Affairs *s/s*

Subject: Guidelines to Govern the Review and Approval of Gaming Contracts and Other Gaming Activities

This memorandum replaces the memorandum of the Assistant Secretary — Indian Affairs issued on April 7, 1986, governing the review of tribal bingo management contracts.

These guidelines are to be used in reviewing all contracts, leases, subcontracts, assignments or

agreements submitted after March 6, 1992, related to gaming unless otherwise specified in these guidelines. It also includes instructions covering tribal/state compacts and per capita distributions, as well as other general instructions.

A. Delegation of Authority

1. Area Directors are encouraged to solicit the recommendations of the superintendents. However, authority to approve or disapprove contracts, leases, subcontracts, assignments or agreements related to gaming may not be delegated to the superintendents. 10 BIAM 3.5A.

B. Authority of Tribe

1. Any contract, lease, subcontract, assignment, agreement or ordinance must be signed by an authorized tribal official(s) and include a resolution duly adopted by the governing body with a citation of the section of the tribe's organic document which authorizes the action. When the tribe lacks a formal organic document, a tribal resolution adopted by the general council shall be required.

The terms, contract, subcontract or agreement, for purposes of these guidelines, shall include any arrangement whereby any person or entity is providing management skills, technical assistance or management advice or expertise to a tribe or tribal enterprise for a gaming operation, or any portion of such an operation. The term shall also include any agreement which provides any right or authority to approve, disapprove or have any other control over gaming operations or management decisions affecting such operations, including any employment contract employing any person to manage or otherwise direct a gaming operation.

2. A copy of the tribe's ordinance authorizing and regulating gaming on Indian lands within the tribe's jurisdiction must be submitted along with the contract. The contract shall include a statement that the gaming activity to be conducted pursuant to the contract, lease, subcontract, assignment or agreement will be conducted in accordance with the tribal ordinance. The tribal ordinance will identify the system to be used to complete background investigations. A copy of the approved or pending tribal-state compact, if one exists, should also be included.

C. General Contract Content Requirements

All contracts, leases, subcontracts, assignments or agreements must meet each of the criteria set forth below. In order to facilitate review, contracts shall address each of these criteria in separate paragraphs or sections, each of which should be titled and numbered accordingly.

1. The contract, lease, subcontract, assignment or agreement must set forth: (a) the time and place where it was made, (b) the purpose for which it was made, (c) the services and/or products to be provided under it.

2. A clear statement of the obligations of the contractor, including for example, whether the contractor is responsible for such items as:

a. Maintaining or improving the gaming facility;
b. Providing operating capital to the gaming operation, under what circumstances, and in what amounts;
c. Keeping the gaming operation open for business for a minimum period of time or days;
d. The hiring, firing, training or promotion of employee;
e. The maintenance of the gaming operation's books and records, generation of required financial reports or statements, and implementation and frequency

of audits;

f. Providing or supervising security personnel;

g. Conducting advertising at specified minimum levels;

h. Promptly paying operation bills as they come due; and

i. Maintaining food and beverage services.

3. The contract must have a fixed limited time to run which must be specifically stated. The contract term shall not exceed five (5) years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. Under no circumstances shall the contract exceed seven (7) years.

4. For contracts longer than five years duration, the opportunity for renegotiation or other provision for adjustment shall arise no later than five years after the contract is entered, and include a determination of the extent and investment necessary to justify a term longer than five years duration. The renegotiated compact shall state expressly that certified independent audits were submitted and received by the Tribe. Copies of the required independent audits for the past five (5) years shall be included as part of the renegotiated contract.

5. The contract must specify the amount of the contractor's fee or reimbursement, as well as specify the method used to compute the fee.

6. The contract must specifically identify any contingent matter or condition intended to be a part of the contract including any written or unwritten collateral agreements relating to the gaming operation. The contract must state that it represents the entire agreement of the parties.

7. The contract must include, or have attached, a list of all parties as defined in section H.1.

8. The contract must identify the person/office responsible for employment and personnel matters, and indicate whether Indian preference in employment will

apply to the activity. The contract should clearly set forth whether the employees are employees of the contractor or of the tribe. If they are tribal employees, the contract should indicate whether or not the tribal personnel policies will apply to employees of the gaming operation.

9. Although not required, the contract should indicate how law enforcement and fire protection services will be provided to insure the public's safety.

10. The contract shall specifically state whether assignments or subcontracts will be permitted. If so permitted, the contract shall provide that no assignment or subcontract will be valid until approved by the Secretary or his authorized representative in the BIA. Assignments or subcontracts submitted for approval shall include a list of all parties in interest as defined herein in Section H.1, who shall be required to submit to a background investigation.

11. The contract shall state that approval of any assignment or subcontract to any new party or entity must be preceded by a complete background investigation of such person or entity.

12. Assignments, subcontracts, transfers of interests, or any other transaction resulting in a change in the parties in interest to the contract must be submitted for approval as an amendment to the contract.

13. No contract, equipment lease, subcontract, assignment or agreement relating to gaming shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in the contract.

14. A contract for lease or purchase of gaming equipment shall state that such equipment has been tested, approved or certified by a designated gaming test laboratory and conforms to such technical requirements and standards as may be specified by the State in which the contractor is operating or by the State of Minnesota, Nevada, New Jersey or South

Dakota.

15. A lease or agreement for gaming equipment shall clearly set forth the responsibility for servicing, maintenance and replacement of equipment including a designation of the party to be responsible for insurance coverage.

16. The lease or agreement for gaming equipment shall specify the fee to be paid to the lessor, manufacturer or distributor and the method used to compute the fee.

17. Prior to the installation of any gaming equipment acquired by the tribe, the tribe shall require the lessor, manufacturer or distributor to provide sufficient information and identification to permit the State or a contracted agency to conduct a background investigation as required by subsection B of Section H.

18. The contract shall require the contractor to obtain public liability insurance of sufficient coverage per person and per occurrence for the gaming operation. The contractor shall be further required to obtain insurance on the buildings, improvements and contents thereof for their full replacement value against any loss or damage. The contractor shall be required to supply to the tribe and the Area Director, prior to the opening of the gaming facility, written evidence of the required insurance coverage.

19. The conflict of interest provisions contained in Section F on members of the tribal government shall apply to situations in which a lease or other agreement is proposed in relation to gaming equipment lease or purchase.

D. Financial and Accounting Requirements

1. The contract shall require:

(a) The contractor to furnish the tribe, on at least a monthly basis, verifiable financial reports showing the revenues and expenses of the gaming operation and

shall provide that an independent audit by a certified public accountant acceptable to the tribe will be performed at least annually.

(b) The establishment of adequate accounting procedures to insure that books of account will be maintained and financial statement prepared in accordance with generally accepted accounting principles.

(c) The books of account and financial records to be maintained on or near the reservation to allow access by the tribe. The tribe shall have a right to inspect the books of account and records at all reasonable times, including during gaming business hours to verify daily gross receipts and income, and to secure an independent audit of the contractor's books of accounts and financial operations as deemed necessary by the tribe.

2. The contract shall specify operating expenses and costs and provide a method, approved by the tribe, for determining which non-enumerated expenses will be allowed as operating costs.

3. The contracts shall provide for a minimum guaranteed payment to the tribe on at least a monthly basis which shall take priority over retirement of development and construction costs. The amount and frequency of the guarantee payment to the tribe shall at a minimum bear a reasonable relationship to the financial projections for the gaming operation and the economic experience of similarly situated tribal gaming operations or comparable businesses, to the extent such information is available. The contract shall specify the tribal official to whom, or the bank account where, the tribe's portion of the proceeds will be paid, consistent with the tribe's constitution and bylaws, tribal ordinances or other documents.

4. The contract shall set forth the upper limit on the amount of development, equipment, construction and start-up costs which shall be repaid to the contractor. The method for repayment of funds provided by the contractor, rates of interest, the timeliness and the

priorities for repayment of each item of financing should clearly be set forth in the contract or in exhibits attached to the contract.

5. The contract shall require the establishment of a cash management system adequate to safeguard the funds of the operation and will provide that the tribe shall have the right to oversee the system, including video surveillance.

6. The contract shall specify the amount of the contractor's fee and the method used to compute the fee. If the fee is to be based on a percentage of the net revenues of the gaming operation, such fee shall not exceed 30 percent; fee arrangements that propose to exceed 30 percent of the net revenues may be approved if the Area Director is satisfied that a very substantial capital investment on the part of the contractor, substantial to be judged depending on such factors as the size, cost, location of the proposed facility, is required, and income projections for such gaming activity require a higher fee. In no event may the fee exceed 40 percent of the net revenues of the gaming operations.

7. The contract shall state that provisions of the Internal Revenue Code of 1986, as amended, (including sections 1441, 3402(q), 6041 and 6050 I, and Chapter 35 of such code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations will be the responsibility of contractor.

E. Termination

1. The contract shall clearly set out the grounds and procedures for termination of the contract including but not limited to management contractor's breach of contract or loss of a tribal gaming license. Other reasons for termination may include such causes as contractor's insolvency or bankruptcy, conviction of a

crime involving any aspect of the gaming operation or moral turpitude, misrepresentations, and breach of warranties. The actual termination shall not require the approval of the Area Director but notice of the termination should be provided to the Area Director or an appropriate Bureau official within ten (10) days after the termination.

2. The termination provisions should clearly specify the disposition and ownership of the assets upon termination, including the balances in any of the funds which may be created by the contract.

3. The contract shall have a provision for dispute resolution preferably through a private procedure such as arbitration. A provision apportioning costs of arbitration should be included. The contract should indicate the court with jurisdiction to adjudicate any dispute which cannot be resolved by arbitration, including adjudication of liability and disposition of assets on breach and termination.

4. The contract should indicate whether the tribe waives its immunity with respect to disputes and/or suit to allow the full enforcement of the terms and conditions of the contract and whether there is a cap on that liability.

5. The contract shall provide that any subsequent conviction of any felony or misdemeanor offense shall be grounds for immediate termination of the contract. Further, evidence that a contractor - directly or indirectly - attempts to interfere unduly or to influence any decision or process of the tribal government shall also be grounds for termination of the contract.

F. Conflict of Interest Provisions

1. The contract shall provide that the contractor will not unduly interfere with, or attempt to influence the internal affairs or government decisions of the tribe for its gain or advantage.

2. The contract shall provide that no payment or

thing of value may be made to any member of the tribal government official, relative of any tribal official, or tribal government employee for the purpose of obtaining any special privilege, gain, advantage or consideration for the contractor. The contract shall certify and state that no such payments have been or will be made in the future.

3. The contract shall state that no member of the tribal government, or relative in the immediate household of a member of the tribal government, may be an employee of the contractor or of the gaming operation. For purposes of this section, relative means an individual who is related as a father, mother, son, or daughter. This requirement as it applies to a relative may be waived in writing by the Area Director in appropriate circumstances.

4. The contract shall state that no party in interest, as defined herein in Section H.1, will be an elected member of the tribal government, or relative of an elected member of the tribal government. The contract shall further provide that no elected member of the tribal government or relative of an elected member of the tribal government shall have any indirect or direct financial interest in the gaming operation.

5. As used in this section, the term "member of the tribal government" means the tribal council or governing body including any independent board or body created to oversee any aspect of gaming and any tribal court official.

G. Leasing Requirements

1. The contract shall be consistent with any requirements related to the lease of trust land. If no related lease is submitted, the contract should be examined to determine whether the relationship between the parties, as described, will require a lease. If a lease is required, the tribe will be advised to submit a

lease for review and approval. Leases are to be reviewed pursuant to the provisions of 25 C.F.R. Part 162.

2. A lease shall not include provisions that involve gaming management except as necessary to conform a lease to a management contract.

H. Parties in Interest/Background Investigations/Criminal Checks

A. Parties in Interest:

1. As used in this section, "parties in interest" includes any person or entity (including individuals comprising such entity) having a direct financial interest in, or responsibility for, the management of the gaming operation, including investors, lenders, general and limited partners, corporate officers and directors, all stockholders who hold (directly or indirectly) at least 10 percent of the stock of any corporation which is a party to the contract, and all key employees who will have day to day management responsibility for the gaming operation.

2. Parties in interest also includes any person or entity holding a direct or indirect financial interest in a lease or purchase agreement for the leasing or purchase of gaming equipment.

B. Background Investigations: The requirements for background checks/investigations shall consist of two parts: 1) a background investigation conducted by the tribe on each party in interest having a direct or indirect financial interest in, or management responsibility for, a gaming operation and 2) a criminal history check which shall be compiled by the Division of Law Enforcement Services (DLES) of the Bureau of Indian Affairs (BIA), Washington, D.C.

1. The tribe, prior to entering into a contract shall obtain sufficient information and identification from each party in interest to perform a background

investigation, for the purpose of determining the suitability of such persons for employment in a gaming operation. This information shall be provided in writing to the respective State licensing or regulatory agency or other independent/private agency authorized to conduct background investigations. The tribe shall contract with such an agency to conduct the check. The tribe may require the contractor to post a bond to cover the cost of the background investigation. The tribe shall require, at a minimum the following information:

(a) The full name, any other names used, date and place of birth, citizenship, social security number, drivers license numbers and physical description; and

(b) The dates and places of residence for the past ten years, dates and places of employment and or business including the positions held or types of work engaged in for the past ten years; and

(c) The current business and residence telephone numbers; and

(d) The names and current addresses of at least three personal references who are acquainted with the person during each period of residence or business listed under subparagraph (b) of this section; and

(e) A description of any previous or ongoing gaming or business relationship with any Indian tribe; and

(f) A description of any previous business relationship with the gaming industry generally including the name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit relating to gaming and the status of the application.

(g) For each felony charge, conviction or pending felony prosecution, the charge including any gaming related charges, the name and address of the court involved, and the date and disposition; and

(h) For each misdemeanor charge, conviction or pending misdemeanor prosecution, including any gaming related charges, within 10 years of the date of the contract, the name and address of the court

involved, and the date and disposition; and

(i) A credit bureau report and financial statement disclosing all assets, liabilities and financial interests for each of the past ten years on each person listed as a party in interest; and

(j) Any other information a tribe deems applicable and relevant.

(k) For a party in interest described in subsection A.2, a list of all states in which the lessor, manufacturer, or distributor is licensed to manufacture or distribute gaming equipment, the license numbers, if issued and the operative dates of the license(s).

2. Criminal history data on all parties in interest shall be compiled by the BIA DLES, Washington, D.C. Criminal history information required under this section shall consist of two parts: fingerprints and personal data.

(a) The tribe shall obtain a current set of fingerprints on each party in interest using form FD-258, Applicant Fingerprint Card, which shall be transmitted to the BIA DLES, Washington, D.C. for referral to the Federal Bureau of Investigation (FBI) Fingerprint Identification Division.

(b) In addition to the fingerprint card, the tribe shall require each party in interest to submit personal information indicating the full name(s), any other names used, date and place of birth, citizenship, social security number, drivers license number and physical description. Personal information submitted shall be transmitted to the DLES, Washington, D.C. for referral to the FBI Information Management Division. The Area Director may require any potential party in interest to pay the cost of the criminal history check.

(c) Results of the fingerprint and name check shall be reported in writing to the Area Director as soon as such results are received from the FBI. The Area Director shall notify the tribe of the results as soon as possible.

3. Before a contract is approved, the tribe shall forward a copy of the background investigation results

conducted pursuant to this section to the Area Director.

4. If the Area Director receives additional information raising issues as to the suitability of any parties in interest to participate in the gaming, and the background check results are not dispositive of the issues, the Area Director shall request the tribe to conduct a more thorough check of the parties in question. If the Area Director determines that any false statement was made by the parties in interest by providing false information or the parties in interest have acted in any manner that may be interpreted as a violation of federal law, the Area Director shall refer that information to the appropriate office of the FBI.

5. The Area Director shall forward a copy of the background investigation results to the DLES, Washington, D.C.

6. Whenever there is any change in the "parties in interest," the tribe shall have a background check immediately conducted consistent with these guidelines and forwarded to the Area Director. The Area Director will not approve any contracts when there is a change in the parties in interest until the background check is completed.

I. Review Process

1. Upon receipt of a tribal request to review a contract, lease, subcontract, assignment or other agreement related to gaming, the Superintendent shall transmit the documents in a timely manner to the Area Director for review and approval. Before transmitting documents to the Area Director, superintendents will insure that all the information required by Section H, subsection B. 1. (a) through (k) relating to background investigations has been completed.

2. The Area Director will designate in writing an employee position to receive the background check information and to provide recommendations to the

decision makers on the suitability of the potential contractors. The Area Director will notify the DLES, Washington, D.C., of the designated employee position. If the position is vacant, the position's Supervisor shall automatically receive background checks and provide recommendations.

3. The Area Director shall acknowledge receipt of the documents in writing, to the tribe and the contractor in a timely manner.

4. If the Area Director determines that a contract submitted does not conform to the requirements of the guidelines or the IGRA, the Area Director shall provide written notification to the tribe of needed modifications. If modifications sufficient to bring the contract into compliance with these guidelines cannot be accomplished, the contract shall be disapproved. If the contract is disapproved, the tribe shall be informed in writing of the reasons for disapproval. In no case or under any circumstance shall conditional approval be granted during any period in which the parties are modifying the contract to bring it into compliance with the guidelines.

5. Compliance with the National Environmental Policy Act shall be required before any contract, lease, subcontract, assignment or agreement is approved.

6. A contract is ready for a final decision approving it only after the contract complies with all of the guidelines in this memorandum and the Area Director has received the background investigation results and the FBI criminal history checks. The Area Director shall issue an approval or disapproval in writing within 15 working days of receipt of all information necessary to issue a decision on the contract.

7. A disapproval shall be in writing and shall state the grounds for the disapproval. The Area Director shall not approve any contract if the Area Director determines that:

(a) Any of the principals are persons described in 25 U.S.C. § 2711(e) (1)(A) or (D);

(b) The tribe or the parties in interest have deliberately or substantially failed to comply with the requirements of the guidelines and federal law; or

(c) Any person listed as a party in interest has been convicted of any felony or misdemeanor involving fraud, misrepresentation or gambling offense; or

(d) Any person listed as a party in interest has provided materially false statements and information or has refused to comply with a reasonable request for additional information; or

(e) Any person listed as a party in interest has, or has attempted to unduly interfere or influence for his/her gain or advantage any decision or process of tribal government relating to gaming;

(f) The contract is not in the best interest of the tribe; or

(g) Class III gaming is being conducted without a tribal-state compact; or

(h) The contract fails to meet the requirements of 25 U.S.C. § 2711(b) or the guidelines.

8. The approval by the Area Director shall state that the Secretary may withdraw approval of the contract, lease, subcontract, assignment or agreement at any time, if the Area Director concludes that the parties in interest are unsuitable or that the parties are otherwise violating the IGRA.

9. Copies of approved contracts shall be sent by the Area Directors to the local FBI office, the Indian Gaming Management Office in Washington, D.C. and the NIGC.

J. State-Tribal Compacts

1. All Class III tribal-state compacts shall be simultaneously transmitted by the tribes with the original to the Assistant Secretary - Indian Affairs and a copy to the local Area Office. A resolution or other statement authorizing the tribal signatory to enter into

the compact shall accompany the compact.

2. The Area Director shall notify all tribes of the above requirement.

3. Upon receipt of a negotiated tribal-state compact, the Area Director shall immediately transmit the following information:

(a) The compact is signed by a duly recognized tribal signatory authorized to sign the compact; and

(b) The compact is signed by the Governor of the State or his/her representative; and

(c) A tribal resolution authorizing the compact and the gaming activity is included and is in conformance with the tribe's governing documents and/or process; and

(d) A copy of the tribal constitution and/or other governing document is attached; and

(e) If a lease of trust land is involved, a copy of the environmental assessment conducted and the results.

(f) A copy of the approved management contract, if available, should also be included with the compact documents.

(g) A copy of the tribal ordinance, if available, should also be included.

4. The Area Director shall certify that no other issues exist which impact or affect the gaming operation. If there are other issues the Area Director shall provide an explanation with any backup documentation as may be available.

5. The Assistant Secretary - Indian Affairs shall approve or disapprove a tribal-state compact before the date that is 45 days after the date on which the compact, including an appropriate resolution authorizing the tribal signatory to enter into the compact, is received in the Central Office.

6. A tribal-state compact shall become effective only when notice of approval by the Assistant Secretary-Indian Affairs has been published in the Federal Register.

7. The Assistant Secretary-Indian Affairs may

disapprove a tribal-state compact if the proposed compact violates any provision of the IGRA or any other provision of federal law, as may be applicable or the United States' trust obligations.

K. Per Capita Plans

The provisions in this Section are not required to be part of any contract or agreement relating to the management of a gaming operation. However, as a general matter, any tribe considering gaming should be notified of the requirements under the Indian Gaming Regulatory Act.

1. The Area Director shall provide written notice to any tribe involved in, or desiring to engage in gaming, of the requirements relating to the distribution of net revenues from any gaming activities. The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(b) (3) provides:

> Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if --
>
> **(A)** the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
>
> **(B)** the plan is approved by the Secretary as adequate particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B); (clause (i) or (iii) of paragraph (2)(B) provide that net revenues from any tribal gaming are not to be used for purposes other than to fund tribal government operations for programs and to promote tribal economic development);
>
> **(C)** the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are

disbursed to the parents or legal guardians of such minors or legal incompetents in such amounts as may be necessary for the health, education or welfare of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

2. At a minimum, distribution plans shall be consistent with the purposes established by the IGRA and can include property, housing subsidies, welfare payments, scholarships and other social program payments to tribal members. The distribution plan must provide for payments to tribal members in a uniform and fair manner to eliminate complaints of discrimination.

3. Children may not be excluded from per capita distributions. However, tribes can establish programs with objective criteria which authorize distributions to certain groups, such as scholarship funds for college students, welfare assistance for the needy, or subsistence payments to the elderly. Such programs should be ongoing programs with rational, objective standards. These programs would not be considered to be per capita distributions.

4. Tribes must establish separate accounts for gaming revenues because of the taxable nature of those funds to individuals.

5. If Area Directors become aware of per capita distributions without an approved plan, they should take appropriate action including referral to the Office of the Solicitor for consideration of possible legal action.

L. Additional Requirements

1. The Area Director should also notify tribes involved in gaming or considering gaming of the

Secretary's existing requirements, and the requirements of the Indian Gaming Regulatory Act, for acquisition of off reservation lands for gaming purposes.

2. To the extent that any provision of these guidelines are inconsistent with the IGRA, such provisions shall be superceded by such applicable IGRA provisions.

3. Class III contracts are governed by these guidelines and approved Class III tribal/state compacts. In the event that the tribal/state compact and the guidelines conflict, the compact shall supercede the guidelines. Review and approval will be conducted by the Area Director. This approval shall not be delegated.

4. Any allegation concerning a crime involving gaming in any way shall be routed through the Assistant Inspector General for Investigations, Office of the Inspector General, 1550 Wilson Blvd., Suite 402, Arlington, VA. 22209. That office shall make the formal referral to the proper authorities.

THE SECRETARY OF THE INTERIOR

WASHINGTON

February 28, 1992

MEMORANDUM

To: Solicitor
Assistant Secretary - Indian Affairs
Assistant Secretary - Policy, Management and Budget
Counselor to the Secretary
Chairman, National Indian Gaming Commission

From: Secretary *s/s*

Subject: Directive on Indian Gaming Management

In a December 12, 1991, memorandum, I established a Task Force on Indian Gaming Management. The Task Force was assigned to review and analyze a number of gaming issues. It was to recommend such changes as may be necessary to preserve Indian gaming as an economic activity, to assure adequate protection of the general public and tribal communities from undesirable elements of gaming, to develop better coordination between the Department of the Interior and the Department of Justice, to alleviate law enforcement risks involved with gaming, and to develop a coordinated approach to the transfer of certain gaming functions and responsibilitiues to the National Indian Gaming Commission (NIGC). The Task Force was to consider tribal, state and Federal government concerns and comments relative to the issues of gaming on Indian lands.

Based on the Task Force recommendations, I conclude that the actions which are listed below must be taken. These actions are intended to assure that tribes can maintain gaming as a viable economic enterprise while implementing controls. Your offices are to consider implementation of the following directives to be a high priority. You should report to me on the status of the implementation within a month from the date of this memorandum.

ENFORCEMENT

A. The Assistant Secretary for Indian Affairs (A/S-IA) is to instruct Bureau of Indian Affairs (BIA) Area Directors and Superintendents on the revised Departmental policy and on the new guidelines for approval of contracts. The importance of full compliance, particularly NEPA analysis, must be underscored.

B. The A/S-IA is to determine how many unauthorized games are being conducted and send a cease and desist letter to related tribal councils. He shall

further state that unless unauthorized games are stopped, including gaming operations conducted under unapproved contracts, legal action in the form of civil injunctions will follow. A period for submission of contracts, with money to operators being paid into escrow accounts, will be allowed.

C. The A/S-IA will initiate actions necessary to shut down, as soon as possible, all games and gaming operations which are operating without an approved contract.

D. The A/S-IA, through the Solicitor, will recommend to the Attorney General vigorous criminal prosecution of crimes involving gaming.

E. The A/S-IA will establish a regulatory unit, called the Indian Gaming Management Office, within the BIA to oversee gaming contractors, their background checks applications, the approval of per capita plans, tribal/state compact approvals, off-reservation trust acquisitions for gaming purposes, and the transition to the NIGC. The aforementioned office should also:

1. Devise a curriculum and conduct training of local Area Directors and BIA personnel.

2. Have responsibility to implement all of the directives in this memorandum except those within the purview of the Office of the Solicitor, and report through the A/S-IA on the status of their implementation to me.

F. The A/S-IA will devise a curriculum and conduct training *every year* for tribal personnel, including law enforcement personnel, in financial accounting, detecting gaming fraud, and surveillance.

G. The A/S-IA and the Assistant Secretary for Policy, Management and Budget (A/S-PMB) will develop criteria and procedures for the Department to withdraw approval of management contracts.

INVOLVEMENT OF FBI AND DOJ

A. The A/S-IA will impress upon BIA officials in the field that, with respect to Indian gaming regulations, the FBI is generally a reactive agency; i.e., in most instances, it investigates allegations that it receives from a tribe, BIA official or private citizen.

B. The Solictor will establish a coordinating process with the Attorney General's Subcommittee on Indian Affairs to insure a consistent policy on legal issues.

C. The Solicitor will expedite the development of a Memorandum of Understanding between the FBI and the BIA concerning a coordinated law enforcement approach to Indian gaming offenses.

REVIEW OF ADMINISTRATIVE GUIDELINES ON GAMING CONTRACTS

A. The A/S-IA will require strict adherence to the Indian Gaming Regulatory Act (IGRA) requirements through the issuance of an interim policy including the requirement that tribal ordinances be submitted along with contract documents.

B. The A/S-IA will initiate actions to withdraw conditional approvals in cases where there are clear indications that IGRA requirements are being violated and will require tribes to comply with the statutory requirements of the IGRA.

C. The A/S-IA will develop a system for follow-up and monitoring of gaming operations not in compliance with IGRA requirements and Departmental policies and establish a grace period (up to six months) within which tribes will be required to comply. Consequences or sanctions for not complying can include termination of gaming activities and referral to the Department of Justice for civil and criminal prosecution.

D. The A/S-IA and the A/S-PMB will revise and reissue administrative guidelines pending the transfer of responsibilities to NIGC.

E. As part of the revised guidelines, a model management contract and checklist to insure that the statutory requirements of IGRA are included in management contracts will be developed by the A/S-IA.

BACKGROUND CHECKS

The A/S-IA will take actions which, with respect to background checks:

A. Require adherence to IGRA requirements;

B. Where appropriate, enable BIA law enforcement to access other background checks done by states or the FBI for other tribes or state licenses;

C. Have contractors pay for an expanded check;

D. Require credit checks;

E. Require more in depth checks for selected contractors;

F. Seek investigative assistance from State Gaming Commissions and other Federal, State and local agencies;

G. End conditional approvals of management contracts;

H. Revise and reissue administrative guidelines which incorporate the above recommendations; and

I. Have the BIA law enforcement central office establish a central file of all background checks requested and completed, with periodic status reports to the Indian Gaming Management Office in BIA and the Associate Solicitor, Indian Affairs.

PER CAPITA DISTRIBUTION PLANS

The A/S-IA will take actions which:

A. Establish a grace period within which gaming tribes will be required to come into compliance with IGRA requirements;

B. Develop guidelines to insure adherence to IGRA requirements. At a minimum the guidelines should include a requirement that distributions to individuals be in line with the purposes authorized, such as, property, housing subsidies, welfare payments, scholarships and other social program payments to tribal members in a uniform and fair manner. Central office staff should develop the guidelines with review and input from Area and field staff;

C. Develop regulations to govern gaming revenue distributions; and

D. Inform tribes that per capita distributions are taxable and work with the Department of Treasury and the IRS to insure notice to tribes of income tax laws, particularly reporting requirements.

APPROVAL PROCESS FOR TRIBAL-STATE COMPACTS

The A/S-PMB will revise a Secretarial order for reissue to delegate authority to the Assistant Secretary-Indian Affairs for approval of tribal-state compacts. Responsibilities related to approval of tribal-state compacts should continue in the BIA, with Solicitor office review.

The A/S-IA will:

A. Develop and issue a policy directive on standards of review and procedures to insure approval of tribal-state compacts; and

B. Move to bring tribes currently operating Class III gaming without tribal-state compacts into compliance with IGRA requirements.

LANDS INTO TRUST FOR GAMING

A. The BIA will complete and publish the proposed trust acquisition regulations no later than April 1, 1992. In the interim, when considering requests by tribal governments to take off-reservation lands into trust for the purpose of establishing an Indian gaming enterprise and until final trust acquisition regulations (25 CFR Part 151) are published, the BIA shall follow the provisions of the IGRA and the existing regulations found at 25 CFR Part 151. Pursuant to the IGRA, consultation with local, state, and tribal government officials is required. Guidelines to implement consultation requirements shall be developed and followed by the BIA. If appropriate, further revisions to the trust acquisition regulations should be considered to incorporate the IGRA requirements.

APPROVAL OF LEASES INVOLVING GAMING ACTIVITIES

A. The A/S-IA will direct field staff that gaming leases are not to be approved if they contain provisions that should properly be included in management contracts.

B. The A/S-IA will review the lease cancellation provisions of 25 CFR 162 to determine the means of providing more protection to Indian lessors.

TRANSITION OF FUNCTIONS TO THE NIGC

The Counselor to the Secretary will establish a working group representing the Commission, the A/S-PMB, A/S-IA and the Solicitor's Office, to monitor implementation of the short and long range goals listed above, including effectuating a smooth transition to the NIGC of those responsibilities it has under the IGRA.

cc: Inspector General
Department of Justice